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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF APPEALS  
OF  
MARYLAND.

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BY RICHARD W. GILL,  
CLERK OF THE COURT OF APPEALS.

VOL. V.  
CONTAINING CASES IN 1847.

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BALTIMORE:  
PRINTED BY JOHN D. TOY.

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## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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### OF THE COURT OF APPEALS.

HON. STEVENSON ARCHER, Chief Judge.

HON. THOMAS BEALE DORSEY, Judge.

HON. E. F. CHAMBERS, Judge.

HON. ARA SPENCE, Judge.

HON. ALEXANDER C. MAGRUDER, Judge.

HON. ROBERT N. MARTIN, Judge.

### OF THE COURT OF CHANCERY.

HON. THEODORICK BLAND, Chancellor.

HON. JOHN JOHNSON received the Great Seal, and took the oath of office as Chancellor, on the 21st December, 1846, vice THEODORICK BLAND, Esquire, deceased.

### OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's* Counties.

HON. ALEXANDER C. MAGRUDER, Chief Judge.

HON. EDMUND KEY, Associate Judge.

HON. CLEMENT DORSEY, Do.

HON. P. W. CRAIN, Associate Judge, vice CLEMENT DORSEY, Esquire, deceased.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne and Talbot* Counties.

HON. E. F. CHAMBERS, Chief Judge.

HON. PHILEMON B. HOPPER, Associate Judge.

HON. JOHN B. ECCLESTON, Do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel, Montgomery and Carroll* Counties, and *Howard* District.

HON. THOMAS BEALE DORSEY, Chief Judge.

HON. THOMAS H. WILKINSON, Associate Judge.

HON. NICHOLAS BREWER, Do.

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HON. ARA SPENCE, Chief Judge.

HON. WILLIAM TINGLE, Associate Judge.

HON. BRICE J. GOLDSBOROUGH, Do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

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HON. RICHARD H. MARSHALL, Associate Judge.

HON. THOMAS BUCHANAN, Do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

HON. STEVENSON ARCHER, Chief Judge.

HON. JOHN PURVIANCE, Associate Judge.

HON. JOHN C. LE GRAND, Do.

## OF BALTIMORE CITY COURT.

HON. NICHOLAS BRICE, Chief Judge.

HON. ALEXANDER NISBET, Associate Judge.

HON. W. G. D. WORTHINGTON, Do.

## ATTORNEY GENERAL.

GEORGE R. RICHARDSON, Esquire.



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CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF APPEALS  
OF  
MARYLAND.

JUNE TERM, 1847.

JOSEPH GOODBURN AND ANN B. HIS WIFE, *vs.* SAMUEL  
STEVENS AND OTHERS.—*June, 1847.*

Upon an appeal from an order of the Court of Chancery determining a question of right between the parties, and directing an account to be stated on the principle of such determination, in pursuance of the act of 1845, ch. 367, this court can only inquire into the correctness of the principles announced by the Chancellor as the basis of the auditor's report.

This court cannot consider any other questions than those determined by the court below for the government of the auditor, without exercising original jurisdiction.

Although a partnership be fixed for a particular term, yet it is understood as an implied condition or reservation, unless the contrary is expressly stipulated, that it is dissolved by the death of either of the partners, at any time within the period.

Where a partner died in 1825, and his administratrix and widow in 1830 filed her bill, charging that the personal property of her husband had been employed in the business of the partnership by the defendants, and prayed that they may be compelled to account for the profits made since her husband's death out of the personal property, it was her right, at her election, to demand either the actual profits made by the survivors from the use of her husband's share of the partnership property, or interest upon the capital thus employed. Such being her right, the assertion of it cannot be justly regarded as evidence of an assent on her part to the continuation of the partnership, so as to im-



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Goodburn and wife *vs.* Stevens et al.—1847.

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plicate her as partner;—or as a ratification of the acts of the surviving partners.

Surviving partners who show by their answer to a bill filed for an account by the administratrix of a deceased partner, that they never consented to receive her as a partner after the death of her intestate, and acknowledge their liability to account, cannot claim to have the partnership accounts brought down to a period subsequent to the dissolution caused by death.

When a partnership is dissolved by death of a partner, the accounts are to be taken at that time, for the purpose of ascertaining the condition of the partnership, and the rights of the respective partners to the joint property.

Where it appeared that real estate had been used by a partnership for a long series of years in the manufacture of iron, and that upon the death of any partner, his heirs at law, to whom the land descended, came into the partnership in his place, and there was no proof of any articles of partnership, it was held, that the whole partnership estate, whether consisting of real or personal property, was to be regarded in equity as a consolidated fund to be appropriated primarily and exclusively to the satisfaction of partnership debts.

In the absence of any agreement between partners direct or implied, impressing upon their real estate the character of personalty, the true rule is that the interest of a deceased partner in the partnership lands, is to be treated as real estate, and that his widow is entitled to a suitable allowance out of the proceeds of the sale of the partnership lands, as an equivalent for her dower, provided the partnership shall be found to have been solvent at the period of its dissolution.

The doctrine that real estate purchased with the partnership funds for its use, and on its account, is to be regarded in a Court of Equity, as the personal estate of the company for all the purposes of the company, stands upon the familiar and just principle of constructive trust, resulting from the relation which the partners bear to each other, and from the fact, that the estate was brought into the firm, or purchased with the funds of the partnership for the convenience and accommodation of the trade.

Upon the death of a partner, the legal estate of which he was seized as tenant in common passes to his heirs or devisees, clothed with a similar trust in favor or the surviving partners, until the purposes for which it was acquired have been accomplished.

When the partnership accounts are fully and finally settled, in the absence of an express or implied agreement to convert the real into personal estate, no solid reason can be assigned, why the real estate should not be treated in equity, as at law, according to its real nature, and chargeable with the widow's dower.

### APPEAL from the Court of Chancery.

The bill in this cause was filed on the 15th January, 1830, by *Ann B. W. Hayes*, and alleged that she, on or about the 9th December, 1824, intermarried with a certain *Samuel Hayes*, who afterwards, to wit: on the 20th May, 1825, departed this life

intestate and without issue; that at the time of his death, the said *S. H.* was seized and possessed of, or otherwise entitled to forty-seven hundredths of a large and extensive manufacturing establishment, situate in *Cecil* county, Maryland, commonly called and known by the name of *Elk Forge*, consisting of several thousand acres of land, two large forges, a grist mill, saw mill, dwelling houses, blacksmith shop, and various other buildings, situated on the waters of *Big Elk Creek*; also a grist mill, oil mill, and nail factory, with a dwelling house and other out houses, commonly called and known by the name of *Marley Mills*, situate on the waters of *Little Elk Creek*, and about one hundred acres of land lying in the States of *Delaware* and *Virginia*, and from twelve to fifteen thousand dollars worth of personal property thereto attached; that for many years, the business of this copartnership had been carried on under the firm and style of *Samuel Hayes & Company*; the said company consisting at the time of his death, of the said *S. H.*, and of *Samuel Stevens* and *Eliza Stevens his wife, Maria Rudolph, &c., &c.*, that the said *S. H.* at the time of his death, left your oratrix his widow, and the said *Maria Rudolph, John Hayes, a certain Henry M. Hayes, &c., &c.*, his heirs at law; that she hath been informed and verily believes, that the said *Samuel Hayes* acquired twenty-five hundredths or one-fourth part of said co-partnership property, by purchase from a certain *William Seal*, for the sum, &c., and for the purpose of securing him, he executed his mortgage to the said *William Seal* of the interest so purchased, and that at the time of his death, there remained due and unpaid about, &c. on mortgage, and he also owed other debts, to the amount of seven hundred dollars or thereabouts, that the residue of the said *Samuel Hayes'* property, did not exceed the value of five hundred dollars, and consisted of personal property and a lot of ground, with a log tenement of little or no value. And your oratrix hath been informed, and charges the fact to be, that at the time of the death of the said *S. H.*, the said firm owed few or no debts, and the debts due and owing to them, and which have long since been collected by said surviving partners were more than sufficient to pay all the debts due by

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Goodburn and wife *vs.* Stevens et al.—1847.

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said firm, and there was at the time of his death, a considerable profit for division among the said partners. That she had made repeated efforts to prevail on the surviving partners of her said husband to settle the partnership accounts, and to make her such allowance for her interest in the same as might be reasonable and just; but finding all these efforts unavailing, she on the 26th September, 1825, obtained letters of administration from, &c., on her said husband's personal property, hoping and expecting that in her united character of widow and administratrix, she might be able to obtain a final and just settlement of said partnership property and interest. But in this, she has been entirely disappointed, and your oratrix has at last, lost all hopes of an amicable adjustment of her fair claims. In the meantime, the said surviving partners have carried on the business under the firm and style of *S. H. & Co.*, employing as the manager a certain *James Jackson*. They have torn down the old, and built up in its place a large new forge on *Big Elk*; they have erected a large and expensive stone dam on the *Little Elk*, destroyed the grist mill and built an entire new forge, and as your oratrix believes these expensive improvements have been made entirely from the profits of said concern; and they have divided among themselves a large and annual sum exceeding as your oratrix has been informed, three thousand dollars, current money, per annum; and during all this time, your oratrix has not received the sum one of hundred dollars; and the said *William Seal* has been paid only the interest due, on the residue of the before mentioned mortgage; to the end therefore, that the said surviving partners may be restrained from using the said partnership name of *S. H. & Co.*; that they may be enjoined from using *the share or proportion of the personal property* which belonged to the said *Samuel Hayes*; that a receiver may be appointed to receive the profits of said concern, until this matter shall be fully considered in this Honorable Court, that the said surviving partners may be compelled to render a full, true and perfect account of all the transactions of said concern; that they may be compelled to pay off and satisfy the debt, due to the said

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Goodburn and wife vs. Stevens et al.—1847.

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*William Seal*, from that portion of said concern, which was originally bought of him; that they may be required to pay over to your oratrix as administratrix of the said *Samuel Hayes*, his share or proportion of the personal property of said concern as well as his share or proportion of the profits which have accrued thereon since his death; that your oratrix may have a reasonable and just allowance made for her dower in her said husband's interest in said lands and premises, and that the said surviving partners, and the said *James Jackson* their manager, may answer this bill, &c., and its various special interrogatories; and that your oratrix may receive such other and further relief as may be agreeable to equity and good conscience, also for an injunction and subpœna.

On the 18th January, 1830, the Chancellor (BLAND) ordered an injunction and subpœna.

The defendants *Samuel Stevens* and *Eliza M.*, his wife, answered the bill and admitted that the husband of the complainant had a considerable interest in the manufacturing establishment spoken of by the complainant in her bill of complaint, and they believe that his interest was nearly, if not quite as great as the complainant sets forth in her bill of complaint. But these defendants state they are informed, and believe it to be true, that the husband of the complainant acquired by purchase, one-fourth of said interest from a certain *William Seal*, and that the purchase money has not yet been paid for it. These defendants claiming no part of the estate of *S. H.*, (the husband of the complainant) have no particular interest in the question, whether the money yet due to the said *William Seal*, is to be paid out of the personal or real estate, but they are advised that the personal estate is the proper fund for the payment of it, and that the same ought to be so applied. These defendants admit the marriage of the complainant, the death of her husband without children, and intestate, and that the complainant has administered on his estate; they also believe it to be true that the several dates of these events are correctly given, and they admit the same to be correct. They also



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admit that the names of the heirs at law of said *Samuel Hayes* are correctly set forth in the said bill of complaint.

They futher answering, admit that the business spoken of in the bill of complaint, was for several years carried on under the firm and style of *S. H. & Co.*, and these defendants are willing to admit that at the time of the death of the said *S. H.*, the names of the parties interested in said partnership, are correctly stated in the bill. These defendants state, that since the said works have been carried on, different persons have at different times been interested in them, the said *S. H.* himself purchased the interest of some, and became as heir entitled to the interest of others, and at the time of his death his interest in the lands and the buildings and improvements thereon, descended to his heirs, who consented to a continuance of the business for the benefit of themselves and of those to whom the said real estate belongs.

These defendants do not presume that the complainant, as administratrix, can claim any interest in or control over the business of said partnership since the death of her husband. These defendants do not know what amount of debts was due from said *S. H.* at the time of his death, nor what estate he left to pay them with. They expressly deny the charge, that they have opposed a settlement of the claims of the complainant, on the contrary, they are willing the same should take place, and that a decree should be passed for the purpose. These defendants have not that particular knowledge of the business which would enable them to state the amount of the claims against the concern, or of debts due to them at the time of the death of the said *S. H.*, nor of the profits of said concern. The said *S. H.* had for some time before his death been the active manager of the business. The information relative to claims and profits may be had from the books of the concern, to which these defendants refer, and the production of which can be required. These defendants believe it to be true, and admit that since the death of said *S. H.*, a new forge has been built in place of the old one, which would no longer answer the purposes of the concern; and other changes



have been made as stated in the bill of complaint; to these it is presumed the complainant cannot object. The interest of her husband in the real property did not descend to her, and his heirs are now partners in the business. These alterations cannot diminish the claim of the complainant, or the security for her claim, on account of the personal estate. In regard to the personal property of the said partnership at the time of the death of said *S. H.*, these defendants are informed and believe it to be true, that an inventory thereof was taken about the time of the death of the said *S. H.*, that the amount thereof was upwards of \$10,000, that it consisted principally of iron, which was to be sold, and afterwards was sold, and of provisions which were to be consumed, and it is to be presumed were consumed at the works—of coal, which of course was not to be kept, but for which the individuals who upon the death of said *S. H.* became interested in the partnership concerns must account. There were of course, horses, wagons, tools and implements; these it was not expected upon the death of any partner would be divided among the individuals, but would remain on the premises for the use of those still carrying on the business; and the deceased partner upon a settlement of his accounts, to be allowed a fair price for his proportion of said property, most, if not all of such articles, it is to be presumed, would in the course of four or five years, be dead, consumed or disposed of, and others be procured to supply their places. Of these, it would be impossible for these defendants now to give an account, but the inventory taken about the time of the death of the said *S. H.*, and already spoken of, will furnish all the evidence which the complainant can want or require, in order to ascertain if any thing be due to her, as administratrix, in which character alone these defendants are advised, she can claim any such account. These defendants do not admit that when a fair and full settlement takes place, there is any balance due to the said *S. H.* It will be found as stated in the bill, that the interest of said *S. H.* in the concern was considerable; that at the time of his death, as well as for some time previously, nearly one-half of the

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Goodburn and wife *vs.* Stevens et al.—1847.

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land belonged to him; the expenses of such concern were necessarily great, and these expenses were principally defrayed out of the profits of the business, the said *S. H.* as well as the others consenting to it, and being willing thus to invest his profits, and thereby add to the value of his real estate, for much of the land claimed by the said *S. H.*, as the bill of complaint truly states, the said *Samuel Hayes* had not paid; and these defendants are advised that the personal estate ought in the first instance, to be applied to the payment of his debts. These defendants deny the charge that the defendants have divided among themselves a large and annual sum. These defendants state, that the business in which with the other partners they are now engaged, was commenced about thirty years ago, and was then carried on under the firm and style of *Robert May & Co.*; at that time the owners of the land and premises were *Robert May, Joshua Seal, &c.* This defendant, *Eliza M.*, is the daughter of the said *Robert May*, and is entitled to his interest. These defendants have parted with no portion of that interest, and claim none other in the works. The interest of *Joshua Seal* was afterwards, these defendants are informed, transferred to *William Seal*, who subsequently sold, as stated in the bill of complaint, to the husband of the complainant; the interest of *John Hayes* and *Stephen Hayes* have been transferred, and have descended at different times to different persons, and the partnership has been carried on for the benefit of those who at the time owned the property. The husband of the complainant claimed at the time of his death, *Seal's* part and a portion of the original interests of the two *Hayes'* before named; with these claims however, these defendants have no concern. They claim the one-fourth and only the one-fourth part of the property and the profits, and they claim the whole of the interest of *Robert May*, (father of this defendant, *Eliza M.*,) and claim no interest in either of the other (originally) three equal parts. These defendants have as yet received for profits of this estate very little; the expenses of keeping in repair and enlarging the establishment, not authorising an actual payment to the parties of the dividend

of profits which have accrued at any time. But these defendants are informed and believe, that the husband of the complainant, who, for ten or eleven years before his death, and until his death, was the manager of said partnership concerns, and received a salary therefor, did during his life draw his salary, and also his proportion of the profits, and was indebted the concern two or three hundred dollars. These defendants therefore, while they are ready and willing to have a settlement of the concerns of the company, so as to ascertain whether anything can be claimed by the personal representative of said *Samuel Hayes* of the concern, and are willing also that the partnership name of *S. H. & Co.* be no longer used, do object to and protest against the appointment of a receiver to take charge of the property and receive the profits of said concern; the complainant, these defendants are advised, can claim no right to exercise a control over the said partnership concern as administratrix, she may demand a settlement of the account between her intestate and those who, during his life, were his co-partners, and it is not pretended that if there be any balance due to the intestate of the complainant, there is any charge that the same cannot be recovered, or that the personal property or the business of the concern is diminished; as the widow of the said *Samuel Hayes* she may assert her claim to dower; but in this character she cannot claim any right to meddle with the partnership business. While these defendants cannot deny to the complainant a right to assert all her claims, they insist that the appointment of a receiver at the instance of the complainant, would be a wanton violation of the just rights of these defendants, upon the motion of a person having no interest in common with the defendants, and no pretext of right to interfere with and prejudice their interests. The answer of the defendant, *James Jackson*, who is the agent of the company, will show it is expected, the amount of pig and bar iron, and of materials, and which were on hand at the time of the death of said *Samuel Hayes*.

These defendants must rely upon him to furnish such information, and upon the books of the concern to furnish whatever

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information is wanted of the situation of its affairs at any particular time, to whom the said partnership was indebted, who were its debtors, what sales and purchases were made on account of the concern, and all the information which may be wanted in order to a fair and full settlement of the account of the said *Samuel Hayes* with the other partners. The complainant has not specified in her bill of complaint, at what period of time her husband became the purchaser of the several interests to which, as a partner in the concern, he acquired title, &c.

The other defendants also answered the bill, and exhibited therewith, accounts current; schedule of the interests of the various partners in the partnership property; inventories of its personal property, taken on the 1st May, 1825; of the personal property of *Samuel Hayes*, and list of balances due to, and by the partnership.

Exceptions were taken to the answers by the complainants.

The defendants moved for a dissolution of the injunction, and on the 22d July, 1830, the Chancellor (BLAND) passed the following order.

“ With respect to the real estate of which the plaintiff claims dower, I consider the answers as sufficiently full and explicit; and as regards the share of the personal estate which the plaintiff claims as the administratrix and widow of the late *Samuel Hayes*, due to him at the time of his death, it appears, that he had been the manager of the manufacturing establishment, an account of which is called for, some years before, and up to the time of his death; and therefore, these defendants have answered as fully and particularly as was in their power. The act of 1798, ch. 84, gives to parties a right to call for books, writings and papers, and in a partnership of the complicated and extensive nature which this seems to have been, it is sufficient for the surviving partners to answer in general terms, to a general call for an account, with reference to an offer to produce the books of the concern, unless the bill states, as it does not in this instance, that they have some particular knowledge of the affairs of the partnership, other than what



may be derived from the books so offered to be produced; and such statements are not denied or sufficiently explained away.”

“Whereupon it is ordered, that the said exceptions to the answers of the several defendants be, and the same are hereby overruled, without costs—and it is further ordered, that the injunction heretofore granted in this case, so far as it extends to prohibiting the defendants from using the share or proportion of the personal property which belonged to the said *Samuel Hayes*, be, and the same is hereby dissolved; and as to all else, the same is hereby continued until the final hearing or further order.”

On the 5th June, 1833, the cause was referred to the auditor by consent, with liberty to take proof, and a great variety of testimony was taken.

In August, 1841, *Mrs. Hayes* having in the meanwhile married the appellant *Joseph H. Goodburn*, a petition was filed to make him a co-complainant in the cause.

On the 31st August, a decree was passed by consent for the sale of the partnership property in the proceedings mentioned, and a trustee appointed for that purpose.

At July term, 1844, this cause was by order of the Chancellor consolidated with several other causes affecting the partnership property, which made the assignees of *William Seal's* mortgage, and creditors of the partnership—parties hereto.

On the 21st October, 1845, after much proof had been taken, the auditor of the court appointed specially by consent in this cause, reported that the accounts stated by him are comprised in various schedules, marked G, No. 1 to 12 inclusive.

“The auditor reported that he had assumed the books of the firm of *Samuel Hayes & Co.* and their successors, called for by the complainants, and exhibited by the defendants, as evidence in the cause, and has assumed the accuracy of various schedules, from A to E, filed in the cause on the 5th March, 1841, as to names, amounts, and additions, and has assumed also, after rejecting the credits of real estate \$1,928 75, and \$2,877 63 in schedule D, that the co-partnership of *Samuel Hayes & Co.* was insolvent. He has assumed also, that the partnership termi-



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nated with the death of *Samuel Hayes* in May, 1825, from which period, his widow and administratrix had no interest or concern as partner in its concerns. Proceeding with these principles, he states, that Exhibit No. 1 shows the debts due the firm, and the sums never realized by it from its debtors. That statement G, No. 2, shows the state of the firm, independent of its real property, at the death of *Samuel Hayes*, from which account, all sums due the partners for dividends and profits as credited on the books are excluded, and from which it appears, that the sum of \$14,197 33 ought to be divided among the partners, being the balance received by the surviving partners in 1825.

Statement G, No. 3, shows the balances due the various members of the firm for dividends and profits, and particularly the interest of the deceased in those profits, as they appear on the books of the firm, collected in schedule D, and demonstrate the insolvency of the firm in their personal estate.

G, No. 4, parts 1 and 2, shows the interest of *Samuel Hayes* in the firm, and how that interest accrued by purchase, and by inheritance.

G, No. 5, shows the balances due on the bonds of *Samuel Hayes* for the property purchased of *William Seal*; at the time of *Hayes*' death, all the interest due was paid, and the sum of \$4,845 32 was due for principal. The heirs of *Samuel Hayes* claim to throw that debt upon his personal estate; but as that estate is also insolvent, they have only credit in account G, No. 10, for \$3,685 15. The balance is thrown upon the real estate of *Samuel Hayes* before the dower of his widow is estimated, that estate being under mortgage at the time of his death.

Account G, No. 6, shows the various sums for interest paid by the surviving partners of *Samuel Hayes & Co.* upon the bond of their deceased partner, between the years 1825 and 1838, amounting to \$2,952 13. This accountant has given these defendants no credit for those payments, considering them made in their own wrong. If the surviving partners had settled the estate promptly, they would have paid *Mrs. Hayes*

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in 1826, or 1827, \$3,818 81, with which she could have paid off much of the debt to *Seal*; but they elect to keep that debt unpaid—pay the interest of it, and now claim to pay it out of the proceeds of the sum which they so withheld: while this accountant reports that the heir-at-law has an undoubted right to throw claims upon the real property, for payment upon the personal estate; yet where he holds both funds, and keeps back the personal estate, it would be unjust to allow him interest to the detriment of the widow's dower. The unpaid principal of the mortgage is only deducted in these accounts, in estimating the widow's dower. Statements G, No. 8 and 9, show the sum due the assignee of *Seal's* bonds, with interest to 1st September, 1845. These debts, the defendants, survivors of *Samuel Hayes*, agreed to pay, seeking their reimbursement as far as they are entitled to it, out of the personal estate of the deceased obligor, they claim to be substituted to *Seal* and his assignees as against that estate.

Statement G, No. 10, shows the basis of the estimate for the purpose of ascertaining *Mrs. Hayes'* dower, and is brought down to the time of the first sale under this decree, 8th Dec'r, 1841. It is supposed that after that time, the Chancellor will allow *Mrs. Hayes* a proportion of the proceeds of sales, looking to her age and state of health; but as the sales are not yet completed that allowance cannot now be made. G, No. 11, is stated to marshall the assets of *Samuel Hayes*, to show what proportion of *Seal's* debt is paid by the personal estate of the deceased, in the hands of his surviving partners, to wit: \$3,685 15.

G, No. 12, shows the sums due *Mrs. Hayes* on the 8th December, 1841.

This accountant reports to your Honor, that as the principal part of this sum is due for dower, he is in doubt whether the surviving partners of *Samuel Hayes & Co.* are jointly liable for the whole sum. He supposes they are not so liable, but that each surviving partner is only liable to the extent of the real property which he inherited from *Samuel Hayes*, the deceased; if so, this accountant requests directions from your Honor how

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he is to state such an account, whether the heirs only are chargeable—whether each heir is chargeable separately, or the whole jointly. If all the defendants who jointly used the real property in connexion with their business as partners after *Hayes'* death, are jointly liable for the whole, the parties so liable may be readily ascertained; but if they are not so liable, some further proof to show the extent of their respective interests will be necessary."

On the 22d Oct. 1845, the special auditor submitted the following additional report:

"That no articles of partnership between *Samuel Hayes* and his survivors appear in this cause; a partnership is established by inference of law, but no *definite* limitation can be inferred, neither its duration, nor to the terms on which it is to be conducted after the death of any partner is established. It results that upon the death of *Samuel Hayes*, his personal representatives, or his heirs-at-law, or the surviving partners might demand its full and final settlement, a partition of the land, and distribution of the personal estate; *Mrs. Hayes* sought a settlement, and the answers insist that the defendants were willing to settle with her, but nothing was done, and the first bill was filed in 1830,—meanwhile, the heirs-at-law of *Samuel Hayes*, and the surviving partners of *S. H. & Co.*, the tenants in common with the heirs aforesaid, proceed to use the property, personal and real, and make the profits stated in schedule G, No. 13. It appears then, that the heirs of *Samuel Hayes*, and the surviving partners undertook by common consent in the pursuit of a common purpose, for their common and exclusive benefit, to use the whole estate, real and personal, of the partnership, and took no measures to satisfy the legal and equitable rights of *Mrs. Hayes*; under these circumstances, the accountant reports that the heirs of *Samuel Hayes*, and his surviving partners now in being, should be held responsible to *Mrs. Goodburn* for the whole sum, jointly stated in account G, No. 12, as due her, and that it should be first paid out of the proceeds of sales reported in this cause."

"22 Oct. 1845."

Both parties filed exceptions to the auditor's account; but as the subjects of those exceptions were not carried up on this appeal, they are here omitted.

On the hearing of the exceptions, the Chancellor (BLAND) on the 19th January, 1846, ordered that this cause be, and the same is hereby again referred to the said special auditor, with directions to restate the accounts from the pleadings and proofs now in the case, and from such other proofs as may be laid before him. "It must be recollected, that the persons of whom the partnership in the proceedings mentioned, has been constituted, are to be considered as having been endowed with two separate legal capacities, *first*, with that of an associated conventional capacity as a partnership; and *secondly*, with that of a natural capacity belonging to them as individuals; and that as the social, artificial, capacity of a partnership is entirely distinct from the natural capacity of each individual; and as each legal capacity stands, in all cases, as a distinct person, these two capacities of these parties must be carefully observed, and treated throughout this case, as distinct persons. In respect to all property belonging to the partnership, and so long as such property may be so held, or be continued under the control of this court in this suit, the accounts are to commence with the original formation of the partnership, and to be brought down through all its mutations, by any changes of the persons by whom it was constituted, unto its final dissolution by the decree of the 31st day of August, in the year 1841. The partnership might have been treated as having been terminated by the death of *Samuel Hayes*, deceased; but his representatives so far from asking for its then dissolution, have, some of them, insisted on its continuance, and as his widow and administratrix has only called for a settlement, on the apparent presumption of its continuance, the partnership must therefore be taken to have been so continued, on its then existing terms, by the express or implied consent and contract of all concerned. All the property belonging to the partnership, of whatever nature or kind, must be considered as its estate, and being so held by those individuals in their associated capacity



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as a partnership, must be treated as liable exclusively, and in the first place, to none other than claims against that artificial capacity or person; and consequently, whether such property of the partnership be considered as real or personal estate, none of it can be held liable to the claim of a creditor, dowress, heir, devisee, widow, legatee, or next of kin, of any living or deceased partner in his natural capacity, until all claims against the partnership have been satisfied, and the whole concern has been so completely wound up and adjusted, as to enable each member of the partnership to take his due share of the surplus, or the residuum in his individual and natural capacity. And as a widow of a deceased partner can have dower assigned to her out of none other than such real estate of inheritance of which her husband had been in his natural capacity, sole seized during the coverture; and as it does not appear that *Samuel Hayes*, deceased, was, at any time, so seized of any real estate held by the partnership as in the proceedings mentioned, his widow can have no right to dower as claimed by her bill of complaint; and recollecting moreover, that as no one of the partners or his representatives can be entitled to any thing more than his due share of so much of the partnership property as remains after all its concerns have been entirely closed, it is only that residuum which is to be distributed according to its true value; and as that true value can only be ascertained by an actual sale, it has been deemed necessary, in all cases, to have it all sold, whether consisting of real or personal estate, so as to make an accurate distribution of the net proceeds of sale, considering the whole as personalty among the partners, according to the terms of the contract or partnership, or among the legal representatives of a deceased partner, according to their legal rights and interests.”

“And the parties are hereby authorised and allowed to take testimony in relation to such accounts,” &c.

From this decree, the complainants *Goodburn & Wife* appealed to this Court, under the act of 1845, ch. 367, mentioned in the opinion delivered in this cause.



This appeal was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By MAYER and REVERDY JOHNSON for the appellants, who insisted :

1. If the real estate here is to be regarded as personal, it is to be so treated, subject to the dower right of *Mrs. Goodburn*; and dower should be allowed to her, if not specially, at least, an equivalent out of proceeds of sales. This claim she has not abandoned, either by the tenor of the bill, or by having for some years deferred the filing of the bill.

2. The partnership, as to *Samuel Hayes'* interest, was at an end at his death; and his widow's rights, as administratrix, or for dower, are to refer to that period; the option being left to her, on her husband's share of property used by the survivors, to claim either interest or actual profits, earned between the death of *Hayes* and the filing of the bill, without, however, implicating her as partner, by claiming such latter *compensation* for the use of the property.

3. The proportion of the property to be allowed, as *Samuel Hayes'* interest, is,  $\frac{1}{3}\frac{5}{8}$ . The personalty existing at his death, is proved by the answer and books of the defendants. For the specific chattels, whether preserved or consumed, the defendants are answerable; and there is no abatement to be made from the amount of claims belonging to the partnership, except for the small amount where positive proof of actual insolvencies has been given.

4. The amount due *Samuel Hayes*, for dividend-claims at his death, as well as the amount on general account, is to be fully allowed, and without abatement from any comparison between debts of the partnership and the amount of personal assets. For all such allowance to *Samuel Hayes*, the personal and real estate avails, are to be consolidated.

5. For any claim of *Mrs. Goodburn*, as administratrix, or for dower; she has a lien on the proceeds of sales, made in the cause, as to dower, paramount to all creditors of the concern, existing at (1825,) her husband's death; and, as admini-

istratrix, secondarily, to only the claims of such creditors. She is entitled in the same way for rent; as to her dower, or interest in lieu of it, on the average value, as stated by the auditor, of the realty at her husband's death.

6. The bonds of sale, and any payments on that account, made before *Hayes'* death by the partnership, are not to be regarded as charges primarily on the personal estate, nor, as to *Mrs. Goodburn's* dower, to interfere with her allowance out of the sales of the realty.

By McLEAN and McMAHON for the appellees.

The appeal now before the court is from the order of 19th January, 1845, and taken under the act of 1845, chap. 367, sec. 1st.

The appeal is, therefore, to be confined to that part of the order which determines "a question of right between the parties," and directs "an account to be stated on the principle of such determination."

The above order determines only,

1st. That the partnership continued to 1841, and

2ndly. That the complainants are entitled to dower, or an allowance in lieu thereof, only after the payment of partnership debts.

No other questions have been settled by the court below, and they cannot, of course, be considered by this court, without exercising original jurisdiction.

It will be contended, that the said order ought to be confirmed, because,

1st. If the partnership existing previously to the death of her husband, was continued by the express or implied consent of *Mrs. Hayes*, after his death, the order appealed from was correct in directing the accounts of the partnership to be taken down to the 31st August, 1841, and postponing her claim as administratrix and dowress, until the payment of all the partnership debts, existing at that period.

2nd. That the origin of the partnership, and the manner in which it was continued by the heirs and representatives of

deceased partners; its admitted continuance after the death of *Samuel Hayes*, the husband of the complainant, by all of his heirs at law and next of kin; the admitted negotiations and transactions of the complainant, the widow, with the partners after the death of her husband; the claim to relief made by her bill in this case; the prompt offer of the defendants by their answers to have a sale of her husband's interest, or of the property, as the court might direct, and to make her a reasonable allowance for dower, as asked by the bill; and the subsequent proceedings in the cause after such offer, do manifest an assent on her part to the continuance of the partnership, and an election not to have the works and property of the partnership stopped, and the business discontinued; but to permit them to be carried on for the benefit of the interest she had in the property, or which she represented.

3rd. That the claim made by her in her bill, to participation in the profits of the partnership, which was admitted to have been continued and carried on after the death of her husband, by the surviving partners and by the heirs at law and next of kin of her husband, was, of itself, a decisive election to take her share of the profits of such continuing partnership, and as such an assent to, and ratification of, the employment of her share of the property in the partnership; that such election, thus made, was a continuing election until the final accounts of the partnership were taken; that it was not competent for her to elect, to take profits for a part of the period, elapsing after the death, and to claim interest for the residue of that period; and that even if it were, her election made by the bill, to take the profits, continued unchanged, until the passage of the order appealed from; and therefore the order was correct in the directions given by it, as to the statement of the accounts of the partnership.

4th. As to the 3rd, 4th, 5th and 6th points made by the appellants, the appellees do not deem it necessary to present any counter propositions, as they are, as they conceive, points not presented by the order appealed from.

MARTIN, J., delivered the opinion of this court.

This is an appeal from the order of the Chancellor of the 19th of January, 1846, instructing the auditor as to the principles upon which he was to state the account between the parties.

By this order, the Chancellor has determined:

*First*, That the partnership, in which *Samuel Hayes* was concerned, was to be treated, as subsisting until the 31st of August, 1841, when it was dissolved by the decree passed in the case of the creditor's bill; and that the accounts of the partnership were to be brought down to that period.

*Secondly*, That the entire estate of the partnership, comprising both its real and personal property, was to be regarded as a fund applicable exclusively, and in the first place, to the payment of the debts of the partnership in preference to all other claimants.

And *Thirdly*, That the real estate held and owned by the partners, and used by them in the business of the partnership, was to be considered, as converted for all purposes into personality—as possessing in all respects, the qualities and incidents of personal property, and therefore, not subject to the claim of dower.

The appeal has been prosecuted, at this stage of the cause, in pursuance of the act of Assembly of 1845, ch. 367, enlarging the right of appeal in cases where decrees or orders to account have been passed by the Chancery Courts; and a preliminary point was raised by the counsel, with respect to the questions which were properly open for adjudication on this appeal.

The *first* section of the act provides:—"That an appeal may be taken from any decree or order of the Court of Chancery or County Court, sitting as a Court of Equity, determining a question of right between the parties, and directing an account to be stated on the principle of each determination:" and it is clear, that in our examination of the order, we can only inquire into the correctness of the principles announced by the Chancellor, as the basis of the auditor's report. The right of appeal from these interlocutory orders, has been con-



ferred only where a question of right has been determined between the parties, and an account directed to be stated on the principle of such determination;—and it must be evident, that we could not consider any other questions, than those determined by the court below, for the government of the auditor, without exercising original jurisdiction. A power incompatible with the character and attributes of this tribunal, and, certainly not intended to be communicated by the statute, under which this appeal has been taken.

With respect then, to the first question decided by the Chancellor, we think he erred, in regarding this partnership as subsisting until the 31st of August, 1841.

The doctrine upon this subject has been stated with clearness and accuracy, by *Judge Story*, in his late work on partnership. He says, “although the partnership be fixed for a particular term or period, yet it is always understood as an implied condition or reservation, unless the contrary is expressly stipulated, that it is dissolved by the death of either of the partners, at any time within the period. This doctrine is founded in equitable principles, and is the natural result of the peculiar objects of the contract. Every partnership is founded in a *delectus personarum*, which implies confidence and knowledge of the character, skill, and ability of the other associates; and their personal co-operation, advice, and aid in the management of the business. The death of any one partner, necessarily puts an end to such aid and co-operation. If, therefore, the partnership were not put an end to, by the death of any one of the partners, one of two things must follow; either that the whole business of the partnership must be carried on by the surviving partners exclusively, at the hazard of the estate and interests of the deceased partners, or else, that the personal representative of the deceased, *toties quoties*, who may be a mere stranger, wholly unfit for and unacquainted with the business, must be admitted into the management. The law will not force either of these alternatives upon the parties; but it presumes in the absence of all contrary stipulations, that by a tacit consent, death is to dissolve the partnership, because it

dissolves the power of a personal choice, confidence, and management of the concern.”

In *Craeshey* against *Maule*, 1 *Swans*. 508, Lord Eldon said, “The doctrine that death ends a partnership, has been called unreasonable. Much remains to be considered before this objection can be approved. If men will enter into a partnership, as into a marriage, for better and for worse, they must abide by it; but if they enter into it, without saying how long it shall endure, they are understood to take that course in the expectation, that circumstances may arise from which a dissolution will be the only means of saving them from ruin; and considering what persons death may introduce into a partnership, there is strong reason for saying, that such should be its effect. Is the surviving partner to receive into the partnership at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration?” And the Supreme Court, have declared in *Scholefield* against *Eichelberger*, 7 *Pet.*, 594, “That, although the liability of a deceased partner, as well as his interest in the profit of a concern, may by contract, be extended beyond his death; yet without such stipulation, death dissolves the concern.” The same doctrine is announced in *Vulliamy vs. Noble*, 3 *Mer.* 614. *Crawford vs. Hamilton*, 3 *Mer.* 136. *Gratz vs. Bayard*, 11 *S. & Raw.* 41. *Dyer vs. Clark*, 5 *Metcalf*, 575, and in other cases to which it is unnecessary to refer. It must therefore be regarded as an established principle, resulting from the nature of the contract, and necessary for the protection both of the rights of the surviving partners, and the estate of the deceased, that the death of either of the partners produces *ipso facto* a dissolution of the concern; unless there is inserted in the contract, some provision imposing upon the surviving partners, and the representative of the decedent, an imperative obligation to continue it. There is to be found in this contract of partnership no such stipulation, and, we think that the death of *Samuel Hayes*, on the 20th of May, 1825, is to be treated as the true period of its dissolution.

The counsel for the appellee have however contended, that



if this partnership was continued from the death of *Samuel Hayes* to the 31st of August, 1841, with the express or implied consent of *Mrs. Hayes*, the order of the Chancellor in this respect was correct, and that the consent of the widow and administratrix to its continuation, is to be inferred from her conduct, and especially from the character of her bill, in which she claims a right to participate in the profits earned by the partners, between the death of her husband and the period of the institution of her suit.

*Samuel Hayes* died on the 25th of May, 1825. On the 26th of September of the same year, *Mrs. Goodburn* obtained letters of administration upon his estate, and on the 15th of January, 1830, she filed her bill, in which she charges, "That the personal property of her husband had been employed in the business of the partnership by the defendants, and prays that they may be compelled to account for the profits made since his death, out of the personal property, and that she may have a reasonable and just allowance for her dower in the lands." And assuming the facts stated in the bill to be true, it was the unquestionable right of the administratrix at her election, to demand either the actual profits made by the survivors from the use of her husband's share of the partnership property, or interest upon the capital thus employed.

In *Story on Part.*, sec. 343, it is stated,—“That dissolution by death puts an end to the partnership from the time of the occurrence of that event. It completely puts an end to the power and authority of the surviving partners, to carry on for the future the partnership trade or business. It is therefore the duty of the surviving partners to cease altogether from carrying on the trade or business thereof; and if they act otherwise, and continue the trade or business, it is at their own risk, and they will be liable at the option of the representatives of the deceased partner, to account for the profits made thereby, or to be charged with the interest upon the deceased partner's share of the surplus, besides bearing all the losses.” The rule is also correctly given in a late treatise on this subject. *Cary*, 117.

The author says, “where the surviving partners continue the business, employing in it the share belonging to the representative of the deceased partner, and no express direction has been given by the deceased, relative to the continuance of the business, the party entitled to the share of the deceased is at liberty to choose either to receive the legal interest on the capital so employed, or to take the profits that have arisen from the use of such capital; and in order to enable a party so interested to determine his choice, a decree will be passed directing an inquiry, whether the account of interest or profits will be most advantageous; but unless under particular circumstances, the party having the choice cannot elect the interest for one period, and the profits for another, but must elect to take one or the other for the whole period.”

In *Crawshay* against *Collins*, 15 *Ves.* 227, Lord Eldon said,—

“If the surviving partners do not think proper to settle with the executor, and put an end to the concern, but to make that, which is in equity, the joint property of the deceased and them, the foundation of increased profit, they must be understood to proceed on the principle which regulated the property before the death of their partner.”

The same doctrine is declared and illustrated: In the cases of *Brown vs. Brown*, 1 *P. Will.* 140. *Hammond vs. Douglas*, 5 *Ves.* 539. *Exparte Ruffin*, 6 *Ves.* 119. *Brown vs. De Tasht*, 1 *Jacob*, 295. *Heathcote vs. Hulme*, 1 *Jac. & Walk.* 122, and is too firmly established to be questioned.

As therefore it was the undoubted privilege of the appellant on the case made by her bill, to demand the profits produced by the employment of her husband's share of the property, from his death to the institution of her suit; the assertion of this claim cannot be justly regarded as evidence of an assent on her part to the continuation of the partnership, so as to implicate her as a partner;—or as a ratification of the acts of the surviving partners.

We cannot perceive any thing in the conduct of the appellant, evincive of her assent to the continuation of this partner-

ship; and this question is placed beyond controversy by the commanding fact, that in her bill, she expressly prays that the defendants may be restrained from using, in the business of the concern, her husband's proportion of the personal estate.

There is another objection to the position taken by the counsel of the appellees, that cannot be overcome; and that is, that it is manifest from the answers of the surviving partners, that *they* never consented to receive the administratrix into the firm, as a continuing partner. While they acknowledge their liability to account to her for the partnership property as it existed at the death of *Samuel Hayes*, they reject the idea, that she possessed any authority to interfere in the management of the affairs of the company, subsequent to that period. We have already seen that a contract of this description, is one of personal confidence, in which the ability, skill and character of each partner is supposed to enter into the consideration of his associates, in the formation of the connexion, and that therefore, there can be no legal continuance of a partnership dissolved by death, in the absence of a new assent on the part of the survivors. You cannot impose upon the surviving partner the obligation to introduce into the partnership the representative of his former associate. *Thornton vs. Dixon*, 3 Bro. C. R. 200. *Marquand vs. New York Manufacturing Company*, 17 John. 535. *Pearce vs. Chamberlain*, 2 Ves. Sr. 33.

We think therefore, that the death of *Samuel Hayes* on the 20th of May, 1825, is to be treated as the period of the dissolution of this partnership, and that the accounts are to be taken at that time, for the purpose of ascertaining the condition of the partnership, and the rights of the respective partners to the joint property.

The *second* and *third* propositions determined by the Chancellor, relate to the question, as to what extent and what purposes the real estate of this partnership was to be treated as converted into personalty? We consider it as now established by at least a preponderance of authority, and upon proper and just grounds, that the whole partnership estate, whether con-

sisting of real or personal property, is to be regarded in the view of a court of equity, as a consolidated fund, to be appropriated primarily and exclusively to the satisfaction of all the partnership engagements. In *Fereday vs. Whightwick*, 4 *Con. C. R.* 319, the master of the rolls said,—

“The general principle is, that all property acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and to be first applied accordingly, in satisfaction of the demands of the partnership.”

In *Hoxie vs. Carr*, 1 *Sum.* 183, *Mr. Justice Story*, in delivering the opinion of the court, says,—

“A question often arises, whether real estate purchased for a partnership, is to be deemed for all purposes personal estate like other effects. That it is so, as to the payment of the partnership debts, and the adjustment of partnership rights, and winding up the partnership concerns is clear, at least in the view of a court of equity.” And again, he says,—

“The question, however, in the present case, is not whether real estate, when it is partnership property, becomes to all intents and purposes, in cases of intestacy and wills, personalty, but whether it is to be so treated in equity, as between the partners themselves and the creditors of the partnership. It seems to be the established doctrine of courts of equity, that it is to be treated as personalty, as between the partners and their creditors, in whosoever name it may stand on the face of the conveyance.” This principle is sustained by the cases of *Dyer vs. Clark*, 5 *Medf.* 562. *Howard vs. Priest*, 5 *Medf.* 582, and is to be received we think, as the correct doctrine upon this subject.

But the true question presented for our consideration on this branch of the case, and that to which the argument of the counsel has been addressed is: whether, assuming the partnership to have been solvent, on the 20th of May, 1825, the period of its dissolution, the interest of *Samuel Hayes* in the partnership lands, is to be treated as real estate, descendible to his heirs, and chargeable with dower; or as changed for all purposes



into personal estate, and distributable as such among his personal representatives?

It cannot be denied, that upon this question there has been both in England and in the courts of the United States, great diversity of judicial opinion and decision. But the case before us is clear of any agreement between the partners, direct or implied, impressing upon their real estate, the character of *personalty*, and under such circumstances, we consider the true rule to be, that the interest of the deceased partner in the partnership lands, is to be treated as real estate, and that the appellant is entitled to a suitable allowance out of the proceeds of the sale of these lands, as an equivalent for her dower; provided of course, the partnership shall be found to have been solvent at the period of its dissolution.

The doctrine that real estate purchased with the partnership funds for its use, and on its account, is to be regarded in a court of equity, as the personal estate of the company for all the purposes of the partnership, stands upon a familiar and just principle. It is the clear case of an implied or constructive trust, resulting from the relation which the partners bear to each other, and from the fact, that the estate was brought into the firm, or purchased with the funds of the partnership, for the convenience and accommodation of the trade. For this reason, in whosoever name the legal title may reside, the estate is held in the eye of a court of equity, for the use of the partners as the *cestui que trusts*, and if a partner dies, the legal estate of which he was seized as a tenant in common, passes to his heirs or devisees, clothed with a similar trust, in favor of the surviving partners, until the purposes for which it was acquired have been accomplished.

But when all the claims against the partnership have been satisfied, the partnership account adjusted, and the object of the trust fulfilled, in a case, where the partners have not either by an express or implied agreement, indicated an intention to convert their lands into personal estate; no solid reason can be assigned, why the real estate should not be treated in a court



of equity, as at law, according to its real nature, and consequently chargeable with the widow's dower.

The proposition thus announced, will be found to be sustained among other cases; by *Thornton vs. Dixon*, 3 Bro. C. R. 200. *Bell vs. Phyn*, 7 Ves. 456. *Balmain vs. Shore*, 9 Ves. 508. *Cookson vs. Cookson*, 8 Simons, C. R. 529, and by a very elaborate and able opinion, delivered by Chief Justice Shaw, in *Dyer vs. Clark*, 5 Medf. 562. In this case it appeared, that the real estate in controversy, was purchased by the partners, with the partnership funds, for the use and convenience of the trade. On the death of *Burleigh*, one of the partners, his administrator sold his undivided moiety of the lands for the sum of fifteen hundred dollars. The firm was represented to be insolvent, unless the proceeds of the real estate so sold by the administrator, should be applied to the liquidation of the partnership accounts. The prayer of the bill was, that the plaintiff might be allowed to retain the rents which had accrued since the decease of *Burleigh*, to be applied to the adjustment of the partnership accounts, and that the defendant might be restrained from paying the proceeds of the real estate to the individual creditors of *Burleigh*. The widow and heirs of the deceased partner, also asserted their claims upon the fund.

In this case, in reference to the rights of the widow, the court say:

“That the right of the widow is not distinguishable from that of the creditors, and heirs of the deceased partner. That as far as this estate was held in trust by her deceased husband for the purposes of the partnership, she was not entitled to dower. For all beyond that she was entitled, because he held it as legal estate, unless she is barred by her release.”

It follows from the views thus expressed, that we consider the partnership as dissolved on the 20th of May, 1825, and that, *that* is the period at which the partnership accounts are to be stated.

That the whole estate of the partnership, consisting both of its real and personal property, is to be applied exclusively, and

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in the first place, to the payment of all the partnership engagements, as they existed on the 20th of May, 1825.

That if the partnership was solvent at the period of its dissolution, the widow of *Samuel Hayes* is entitled to a proper allowance out of the proceeds of the sale of the partnership lands, as an equivalent for her dower. But as to what sum is to be regarded as a fair equivalent for her dower, under the circumstances of the case, and whether she has a lien for her dower, on the proceeds of the sale, are questions upon which we express no opinion, as they are not open for adjudication on this appeal.

The order of the Chancellor is reversed, and the case remanded to the Court of Chancery for further proceedings.

DECREE REVERSED WITHOUT COSTS AND CAUSE REMANDED.

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GEORGE FORBES vs. JAMES FORBES.—*June, 1847.*

A trustee filed a bill against all his *c. q. t.* for a settlement of the trust estate.

Whilst pending, propositions of compromise were made; and that the parties might be fully informed of their rights, the books of the trust were subjected to examination; accounts were examined by the *c. q. t.*'s solicitors and some of the *c. q. t.* and a skilful accountant, at the request of the trustee's solicitor; upon that examination, the solicitor of the *c. q. t.* advised a compromise, which was effected, and carried into execution. Every facility was furnished for the examination of the accounts. No evidence of books or accounts kept back. The solicitors of the parties were fully competent to determine what was due. This led to the execution of a release, by the complainant to the trustee, while under age. Twelve days after he came of age, and about fourteen months after the execution of the *first* he executed a *second* release. *Held*, that the *second* release was based on the *first*; was not subject to the imputation of undue influence, and was made with knowledge of his rights by the complainant, and therefore valid.

A release executed by a ward, or *cestui que trust*, shortly after he attains age, without the necessary accounts or information from which a judgment may be formed of the condition of the estate, would not meet the favor of a court of equity.

The determination of the question, whether necessary information was imparted to a ward or *cestui que trust* to enable him or his advisers to form a judgment of the condition of the estate, and decide whether such a release is valid,

render it necessary to examine into the circumstances connected with it—the conduct and acts of the parties anterior to its execution, though occurring during the minority of the ward or *c. q. t.*

Where two releases—one before arriving at age, and another within twelve days after full age, were executed—if at the time of the *first* release, the necessary information was imparted and the examination of friends and advisers of the *c. q. t.* as to the state and condition of the trust fund was had, these must be considered as the operating causes for the *second* release at the time of its execution.

After accounts between trustee and *c. q. trusts* have been examined by the parties to a bill filed for that object by the trustee, and a release executed, where there is no proof of concealment, upon a bill filed to impeach such release, after a lapse of ten years from its execution, the trustee will not be required to produce actual proof of detailed information of what the records and accounts displayed.

Upon such a bill to impeach the release, the court will presume that the *c. q. t.* being a party to the *first* bill filed by the trustee as aforesaid, had knowledge of every thing he was entitled to know, and proper to be known, for a right decision in regard to his release; and that therefore a dismissal of the bill upon the agreement of the *c. q. t.* several years after, with his trustee, for such dismissal, is such a recognition of his release, as would amount to a confirmation of it, considering it merely as voidable.

### APPEAL from the Court of Chancery.

The bill in this cause was filed on the 14th June, 1841, by the appellee, and alleged that a certain *Elizabeth Forbes* was seized and possessed of considerable real and personal estate, and being about to be married, a deed or marital settlement was executed on the 8th June, 1807, between her intended husband of the first part, the said *E. F.* of the second part; a certain *Thomas Marshall* and *John Forbes* of the third part; and a certain *James, John*, (above named) *James Forbes Sothoron* and *Rebecca A. M. Sothoron* his wife, *James Forbes* and *Elizabeth Forbes*, all of them except *J. F. S.*, children of the first, *E. F.*, above named, of the fourth part; and therein it was set forth that a marriage was agreed upon, and intended to be shortly had, and solemnized between *Samuel Bond* and *E. F.*, first above named; and upon the treaty of said marriage it was agreed by, and between the said *S. B.*, and the said *E. F.*, that all the estate, as well real as personal, of, or belonging to the said *E. F.*, first above named, either in law or in equity, in

possession, remainder or reversion, should be conveyed, settled and assured by the said *E. F.*, unto the before mentioned *Thomas Marshall* and *John Forbes*, and to the survivor of them, and the heirs, executors and assigns of such survivor to the uses, and upon the trusts, &c. &c. That the said marriage was solemnized, and the trustees entered upon the execution of their trust: that afterwards, in or about the year 1820, the said *E. B.*, the first named, died, and the before mentioned *Samuel Bond* is long since deceased; that the estate of the said *E. B.* was considerable; consisting of not only of lands, negroes, stock, and plantation utensils, but of choses in action debts to a very large amount,—although your orator is unable to ascertain the amount of them, or the individuals from whom they were due. That the said *Thomas Marshall* and *John Forbes* took upon them the trust aforesaid, and collected moneys due to said *E. B.*, to a very large amount, of which they have never rendered an account; and of the debts due to said *Elizabeth Bond* as aforesaid, a very large amount if not collected, was lost by the gross negligence and improper indulgence of the said trustees. That the said *John Forbes* died in or about the year 1818, utterly insolvent, and there has been no administration upon his estate. That the said *Thomas Marshall* suffered the said *John Forbes* to waste and convert to his own private uses much of the money and other property of the said estates, and is answerable to those for whose benefit the trust was undertaken, for the amounts so wasted and misapplied, he having had a knowledge at the time of such misapplication, and taking no steps to prevent it, or to make the said *John Forbes* answerable for it. That the said *Elizabeth* (sometimes called *Eliza*) *Forbes*, daughter of said *E. B.*, intermarried with a certain *Horatio C. McElderry*; and subsequently to such intermarriage, and in order to gratify some of the *cestui que trusts*, but without the consent of your orator, the said *Thomas Marshall* did on or about the 29th March, 1820, execute to the before mentioned *Horatio C. McElderry* and *George Forbes*, a deed of which Exhibit B. herewith filed is a copy. That the said *E. B.* is dead, and died without



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having made a last will and testament, or any other instrument of writing, witnessed by two or more credible or competent witnesses, directing and appointing in what manner, or in what shares, portions and amounts, the said property shall go to each of her several children aforesaid; and not having executed the power reserved to her by the deed of marriage settlement, the said estates held in trust as aforesaid, passed to her several children, named as aforesaid; also that said *R. A. M. Sothoron* is dead, leaving her husband *James F. Sothoron*, and her only children *John H. Sothoron* and *Elizabeth*, who has since intermarried with a certain *Samuel C. Webster*. That the said *James Forbes* was the father of your orator, and a certain *Elizabeth*, who has intermarried with a certain *Robert Beale*; that said *James Forbes* died intestate, and no administration has been granted upon his estate, by reason of which your orator and the said *Elizabeth Beale* as the only children of the said *James Forbes* are entitled to a share of said trust estate. That said *Horatio C. McElderry* is also dead, and his widow aforesaid has since died after intermarriage with a certain *William Plater*, who became the executor of the said *Horatio C. McElderry*; that the said *James Forbes* is dead, intestate, and without issue, by reason of which her brothers and sisters aforesaid become entitled to her part of said estate, and the several defendants hereinafter named, being in the possession of said estate, are her executors. That the said *Thomas Marshall* since the execution of the deed aforesaid to *Horatio C. McElderry* and *John Forbes* has died, leaving three sons, to wit: *Thomas H. Marshall*, *Henry Marshall* and *Richard H. Marshall*, to whom a large real estate has descended from their father, chargeable with the debts of the said *Thomas Marshall* if his personal estate should prove insufficient, also that letters of administration upon the personal estate of the said *Thomas Marshall* have in due form of law been granted to the before named *T. H. M.* and *R. H. M.*, who have possessed themselves of the assets of the deceased. That no account has ever been rendered of the said trust estate, either to your orator, or to any other person interested.



That at the time of the execution of said deeds he was an infant, and did not come of age until about the 27th May, 1831. That the above named *George Forbes* was appointed his guardian; but of what estate, in virtue of his said guardianship he possessed himself, your orator has been unable to ascertain; that during the infancy of your orator, or possibly very soon after the said guardianship ceased, the said *G. F.*, without rendering to your orator any account of the original trust aforesaid, or of his guardianship, prevailed upon your orator to execute a deed purporting to exonerate the said *G. F.*, the representatives of the before named *T. M.* and *H. C. McE.*, of any demand, claim or right which your orator had, or could have against them; what disposition has been made of said instrument of writing your orator is unable to say; but he charges that the same, if in existence, ought to be declared null and void, being obtained by a guardian from his ward, by the exercise of undue influence. Your orator also charges that the same was obtained by fraud; the said *G. F.*, not only concealed from your orator the amount of the estate to which he was entitled; but the books which were designed to shew the state of the trust fund had been altered, and thereby the claim of your orator was very much diminished. Prayer, that any such release, or paper if insisted upon, shall be declared fraudulent, and set aside; and that an account of the trust fund be taken precisely, as if none such had been executed. For an account, subpœna, &c.

The several deeds, &c. on which the bill of complaint was based, were filed therewith.

The defendants answered the bill, and among others the said *George Forbes*, the substance of whose answer is sufficiently stated in the opinion of this court.

A great variety of proof was also taken, the character and effect of which are also stated in that opinion.

Among other documentary evidence, the following signed by the complainant were admitted to be proved. These are the releases sought to be impeached by the bill of the appellee

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“Know all men by these presents, that whereas *George Forbes* of *Prince George’s County*, has on this day conveyed to me an undivided moiety in the tracts of land in the said deed mentioned, which I have received in full satisfaction of all claims and demands which I claim to have against the heirs, executors and administrators of *Thomas Marshall* and *Horatio C. McElderry* and the said *George Forbes*, or against any property, real, personal or mixed which the said *George Forbes* claims to hold in any way whatever. Now know ye, that I, *James Forbes*, do hereby in consideration of the premises, remise, release and quit claim all and every demand, claim or right which I now have or can hereafter have in law or equity, of every nature or kind against the heirs, executors or administrators, either of *Thomas Marshall*, or of *Horatio C. McElderry*, or against the said *George Forbes*, or against any property, real, personal or mixed, which the said *George Forbes* claims to hold in any way. And I hereby promise to confirm this relinquishment when I shall have arrived at lawful age.

Witness my hand and seal this 30th of April, 1830.

Witness, JAMES BRAWNER.

JAMES FORBES, [*Seal.*]

“Whereas, *Elizabeth Forbes*, widow of the late *John Forbes*, before her intermarriage with the late *Samuel Bond*, conveyed all her property, real, personal, and mixed, unto her son *John Forbes*, and her brother *Thomas Marshall*, in trust for the purposes and for the uses therein mentioned, and whereas the said *John Forbes* died before the said *Thomas Marshall*, and whereas the said *Thomas Marshall*, by deed duly executed and recorded in his life, conveyed the said trust property to a certain *Horatio McElderry* and *George Forbes*, which said *Horatio McElderry* is since dead, and whereas I, *James Forbes*, claiming by and in virtue of the said deed as aforesaid, executed by the said *Elizabeth Forbes*, an interest in the said trust property aforesaid, have agreed and compromised for all my interest, claim and demand arising by virtue of, or under the said deed of trust so as aforesaid executed by the said *Elizabeth Forbes*, with the said *George Forbes* claiming to act as substituted and surviving trustee as aforesaid. Now know

ye, that I, *James Forbes* of *Prince George's County*, for and in consideration of the premises, and for the sum of ten dollars to me in hand paid by the said *George Forbes* of, &c., have remised, released and forever discharged, and by these presents do remise, release and forever discharge the said *George Forbes*, *Hanson Marshall* and *Henry Marshall*, heirs and representatives of the said *Thomas Marshall*, and *Hugh McElderry*, and *George Forbes*, executors of the said *Horatio McElderry*, of and from all, and all manner of action or actions, cause or causes of action, reckonings, claims and demands whatsoever, either in law or equity, arising under, or by virtue of a claim or demand by me, under colour, pretence or virtue of the said deed so as aforesaid executed by the said *Elizabeth Forbes*, or as being one of the grandchildren of the said *Elizabeth*. And I do hereby further renounce and release every manner of claim or demand whatsoever, to the real or personal property in the said deed by the said *Elizabeth*, executed as aforesaid, or acquired by the said trustees, or any, or either of them. In witness whereof, I have hereunto set my hand and seal, on this eighth day of June, 1831.

JAMES FORBES, [*Seal.*]"

"Received of my uncle, *George Forbes*, nineteen dollars and forty-seven cents, which amount is due *Mrs. Dent* for board whilst I was at *Charlotte Hall*, and which my uncle promised me to pay on our final settlement some time since.

February 7th, 1834.

JAMES FORBES."

After all the proof was taken, the Chancellor (BLAND) on the 19th February, 1845, decreed that the said instrument of writing, signed and sealed by the plaintiff, *James Forbes*, bearing date on the 30th April, 1830: and the instrument of writing signed and sealed by the plaintiff, *James Forbes*, bearing date on 8th June, 1831: and the instrument of writing signed by the plaintiff, *James Forbes*, bearing date on the 7th February, 1834; together with all other instruments of writing in the proceedings mentioned, in so far as they, or any of them, purport to be, or may, by inference or construction, be taken to be a release or discharge from the plaintiff, *James Forbes*,

unto the defendant, *George Forbes*, of any rights or claims of the plaintiff, as set forth in his bill of complaint, be, and the same are hereby each and all of them declared to be fraudulent and void, as against the plaintiff, *James Forbes*. And that the defendant, *George Forbes*, account with the plaintiff of, and concerning the matters and things, rights and claims, of the plaintiff, as set forth in his said bill of complaint; and this case is hereby referred to the auditor, with directions to state an account accordingly, &c.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS SPENCE and MARTIN, J.

By RANDALL and REVERDY JOHNSON for the appellant, who contended:

1st. That the compromise between the appellant and *Marshall*, on the one side, and the appellee on the other, made on the 30th April, 1830, and during the minority of *James Forbes*, was entered into by him, freely, advisedly, and for his own benefit, and when he was in possession of full knowledge of his rights; and that the release he then executed was merely voidable.

2d. That the repeated confirmations of this compromise, after the appellee had arrived at age, viz:

1. By his second release, executed 8th of June, 1831.

2. By the deed which he received with *Beale and wife*, given by the appellant, dated 18th July, 1831.

3. By the deed, executed by himself, and *Beale and wife*, conveying the land, which was part of the consideration of the compromise, to the *Gardners*, the purchasers thereof; executed on the 20th of July, 1831.

4. By appellee's receipt to appellant, executed on the 7th February, 1834,—render this compromise as valid and binding, as if it never had been voidable.

3d. That the compromise made by the appellant with the appellee, was liberal and fair, and taking into the account the amount he afterwards received from the representatives of



*Thomas Marshall*, he, the appellee, has obtained his full share, if not more, of the said estate.

4th. That the averments of the bill are insufficient to entitle the complainant, appellee, to any relief, or account, against *George Forbes*, as guardian or otherwise.

5th. That the suit having been compromised, as against the representatives of *Thomas Marshall*, the defendants, and the bill dismissed as to them, the complainant can have no relief or account, against the appellant.

6th. That lapse of time, and the statute of limitations, as relied on by *George Forbes*, is a bar to any recovery by the complainant, in this suit.

They cited:—13 *Mass.* 239. *Zouch vs. Parsons*, 3 *Burr.* 1794. *Whitney et al. vs. Dutch et al.* 14 *Mass.* 462, 457, 461. *Boston Bank vs. Chamberlin*, 15 *Mass.* 220. *Lowe vs. Gist*, 5 *II. & John.* 106, no. a. *Tucker et al. vs. Moreland*, 10 *Peters*, 71. *Roberts vs. Wiggin*, 1 *New Hamp.* 73. *Bing. on Infancy*, 13, 14. 1 *Sto. Eq. sec.* 320. *Cheshire vs. Barrett*, 4 *McCord*, 241. *Boynton vs. Dyer*, 18 *Pick.* 1. *Murray vs. Shanklin*, 4 *Dev. & Batt.* 289. *Martin vs. Byrom*, *Dudley Rep.* 203. *Kirby vs. Taylor*, 6 *John. C. R.* 242. *Chambers, Ordinary vs. Wherry*, 1 *Bayly*, 31. *Lawson vs. Lovejoy*, 8 *Greenleaf*, 405. *Bigelow vs. Kinney*, 3 *Vermont*, 353. 1 *Greenleaf*, 11. *Deason vs. Boyd & O'Hara*, 1 *Dana*, 45. *Boody vs. McKenny*, 23 *Maine*, 517. *Haywood's N. C. Rep.* 104, 106. *Kline vs. Bebee*, 6 *Conn.* 494. *McPherson on Infants*, 41 *Law Lib.* 340. *Bobo vs. Hansell*, 2 *Bayly*, 114. *Wright vs. Steele*, 2 *New Hamp.* 51. *Chadbourn vs. Watts*, 10 *Mass.* 127. *Ridenour vs. Keller*, 2 *Gill*, 134. *Griffin vs. Griffin*, 1 *Scho. & Lef.* 352. *Green vs. Johnson*, 3 *G. & J.* 390. *Kent Com.* 233. *Sto. Eq. Ple.* 210, 212, 214.

By ALEXANDER and McMAHON for the appellee, who contended:

1. That the first release executed before the complainant attained his age of twenty-one years, is simply void: and independent of this objection, would be set aside in equity, as



obtained by a guardian from his ward, pending a suit in equity, brought by the guardian for administration of the estate, after the court had directed an account to be taken in the cause, without any examination into the state of the accounts by the complainant or any one of his friends, and for a consideration grossly inadequate to the just claims of the complainant. It will be especially insisted that the settlement was based on a principle, i. e. the validity of the pretended appointment by *Mrs. Bond*, which had been expressly repudiated by the court.

2. That the second or confirmatory release was executed without any examination into the subject, instituted by the complainant after he had attained his age of twenty-one years, and without any tender of information made to him by the defendant. It is therefore obnoxious to all the objections (other than the minority of the party) which existed against the original release.

3. That this suit was brought within a reasonable time (say two years) after the complainant had any cause to suspect the fraud which had been practised on him, and within twelve years after the date of the confirmatory release.

They cited:—*Hylton vs. Hylton*, 2 Ves. Sen. 547. *Hatch vs. Hatch*, 9 Ves. 297. 1 Sto. Eq. 317 sec. *Ib.* sec. 617, 320. 24 Law Lib. 327. *Wych vs. Packington and wife*, 1 Bro. Parl. Cases, 372. *West C. Rep.* 148. *Hicks vs. Hicks*, 3 Atk. 274. *Walker vs. Symonds*, 3 Swan, 72, 73. *Wedderburn vs. Wedderburn*, 4 Mylne & Craig, 41. *The State vs. De Witt & Watts*, 2 Hill, 286. *Fish vs. Miller*, 1 Hoffman, 269, 70. *Hunter vs. Atkins*, 8 Con. Ch. Rep. 314. *Wedderburn vs. Wedderburn*, 2 Keen, 722. *Sto. Eq.* 685. *Kelsey & McIntyre, vs. Hobby & Bond*, 16 Peters, 278. *Burke vs. Crosbie*, 1 Ball & Beatt. 232. *Sto. on Eq. P.* 744. *Sto. Eq.* 1521. *Hovenden vs. Lord Annesley*, 2 Sch. & Lef. 634. *South Sea Co. vs. Wymondsell*, 3 P. Wms. 143. *Sto. Eq. Pl.* 213, 214. 41 Law Lib. 84. *McPherson on Inf.* 364. 2 Sto. Eq. 1352. 1 Sto. Eq. 21, 317. 24 Law Lib. 327, *Llewin. Says' Ex'rs vs. Barnes*, 4 S. & Raw. 114. *Hatton vs. Weems*, 12 G. & J. 108. *Jones vs. Curry*, 1 Swan. 71, 72. 24 Law Lib. 327. *Morse*

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*vs. Royal*, 12 *Ves.* 373. *Wood vs. Downes*, 18 *Ves.* 126, 128. *Sto. Eq.* 345. *Tucker et al. vs. Moreland*, 10 *Peters*, 75, 76; *Cresinger vs. Welsh*, 15 *Ohio Rep.* 156. 2 *Dev. & Batt.* 327, 328. 1 *Sto. Eq.* 241, 345. *Calvert on Parties*, 123, 126. *Kirby vs. Turner*, 1 *Hop.* 309. *Story on Eq.* 314. 17 *Law Lib.* 126, 133.

ARCHER, C. J., delivered the opinion of this court.

We do not consider it necessary to enquire into the question, whether the release executed by the complainant before he attained age was void or voidable. The release now in controversy, was executed after the complainant attained age, and the enquiry is whether the release executed at such a time, and under the circumstances, was void. No doubt a release executed by a ward or *cestui que trust*, shortly after he attains age, without the necessary accounts or information from which a judgment may be formed of the condition of the estate would not meet with the favor of a court of equity. The enquiry will, therefore be, whether the necessary information was imparted to the complainant to enable him or his advisers to form a judgment of the condition of the estate?

The determination of this question will render it necessary to examine the circumstances connected with the release above adverted to. The conduct and acts of the parties anterior to the release, though occurring during the minority of the complainant, are connected with the release, and form its basis. If at the time of the first release, the necessary information was imparted, the examination of friends and advisers as to the state and condition of the trust fund was given, these must be considered the operating causes for the release at the time of its execution.

There would under such circumstances, be no room for the imputation of undue influence, when the party must be supposed to act with knowledge.

The complainant arrived at age on the 27th May, 1831. The deed of release in question was executed on the 8th June, 1831.

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By the deed of settlement made by *Elizabeth Bond*, the grandmother of the complainant, under which he claims, *John Forbes* and *Thomas Marshall* were made the grantees and trustees, and after the death of *John Forbes*, *Thomas Marshall* the surviving trustee, on the 9th of March, 1820, conveyed the property then in trust to *George Forbes*, the present trustee, subject to all the trusts contained in the original deed from *Elizabeth Bond*; and in the month of January, 1821, *George Forbes* filed a bill in *Charles* county court, against all the *cestui que trusts*, praying for a settlement of the trust estate under the direction of that court, as a court of equity. This cause was subsequently removed to the Court of Chancery, and while it was there pending, propositions of compromise were made, and that the parties might be fully informed of their respective rights, the books of the trust were subjected to the examination of the respective parties, and the accounts were examined by *Col'n Ashton*, who was solicitor for the defendants in that suit, and by *Mr. Webster*, who was one of the *cestui que trusts*. A statement was also made of the condition of the accounts by a skilful accountant, *Richard Dorsey*, at the request of *Judge Clement Dorsey*, (who was then the counsel of the present defendant, *George Forbes*,) which was exhibited to the parties; and upon that examination, *Col'n Ashton* the solicitor advised the compromise, which was effected with the complainant, and *Beale* the brother-in-law of the complainant, who was himself a lawyer, either from his own examination, or acting by the advice of his solicitor, also accepted the compromise and executed a like release. Every facility was furnished by the defendant for the examination of the accounts, and we have no evidence of any books or accounts being kept back. They were examined by the parties or some of them, and by the solicitors of the parties fully able and competent to determine what was due from the trustees to the *cestui que trusts*. This examination gave rise to the compromise, and release made on the 30th of April, 1830, and forms the basis of the release executed on the 8th of June, 1831, after the complainant arrived at age. It is immaterial whether the com-

plainant examined the books and accounts of the trust, or not. It is sufficient that they were examined by persons competent to make the examination for him.

The fair presumption, we think, from the facts of the case, is, that all proper and necessary information was imparted to the complainant, and the advisers and solicitor of the complainant. The answer of *George Forbes* avers this fact, and it is in proof, that the books of the trust estate were exhibited and examined by skilful and competent men who advised the compromise. The parties knew the trust estate which came to the hands of the defendant, and of course knew his accountability for the rents and profits; and it is a fair presumption, that these rents and profits were taken into the estimate in the adjustment of the compromise. As to the administration accounts of *George Forbes*, passed on the estate of his mother, *Elizabeth Bond*, they were matters of public record, and for aught we know, existing only there, and ought to be presumed under the circumstances of this case to have been known to the parties examining the accounts of the trust fund. With regard to these or any other matter connected with the accounts of the trust, there is no proof whatever of concealment, and to hold the defendant after the lapse of ten years, when the more important witnesses of all these transactions may be dead, to actual proof of detailed information of what the records and accounts displayed, would we think, be to exact more than ought in reason, or justice to be demanded of a trustee, especially in a case where there is proof of frankness, and a desire to furnish information necessary to a proper adjustment of the estate.

Independent of the above considerations, there have been several recognitions of this release as a valid release, made by the complainant at different times. In the complainant's deed to *Ignatius T. Gardner*, bearing date on the 20th July, 1831, the release is expressly referred to, and the lands constituting in part the consideration for the release are for a valuable consideration bargained and sold to *Gardner*.—On the 7th of February, 1834, nearly three years after the release, in a re-



ceipt given by the complainant to *George Forbes*, he recognizes the settlement as a valid settlement.

Again, the complainant was made one of the parties to the bill of *George Forbes*, filed for a settlement of the trust estate. This bill was answered by *James Sothoron* for himself, and as guardian for the defendant. And although the record does not show that an order was passed, appointing said *Sothoron* guardian *ad litem*, the answer was not objected to as an answer for the infants, but would seem from the proceedings to have been taken as a valid answer, and the cause proceeded as if the parties were all regularly parties in court, and had duly answered, commission issued to take testimony, affidavits were taken, orders passed to bring in the books of the trust estate and the books of *James Sothoron*, and references were made to the auditor to state an account. It is manifest that the Chancellor, and the county court from which the cause was removed, treated the complainant as a party, and as having duly answered the bill. The complainant thus being a party to this bill, on the 1st January, 1833, by his solicitor entered the bill dismissed by agreement. This agreement for the dismissal of a bill for the settlement of the trust, was made more than a year after the release in question, and it may be presumed, that so far as the present complainant was a party to that agreement, the dismissal was founded on his release and the consideration which passed to him for that release. If the complainant is to be considered as a party to this proceeding, and if the above presumption is just, this agreement was another unequivocal recognition of the release in question.

It is obvious that the great difficulty in the way of the complainant, was the large account which stood on the trust books against the father of the complainant, which would occasion a proportional diminution of the sum to be paid to the complainant for his distributive share. It could not be pretended that the parties were ignorant of *George Forbes'* liability for the rents and profits of such of the estate as was in his possession, or the amount thereof, or that they were ignorant of the administration of the estate of *Elizabeth Bond*; accordingly,



in this proceeding, the whole condition of the trust estate was developed. The rents and profits of the lands were brought into view; the administrative accounts of *George Forbes* constituted a part of the record. It is therefore clear, that if the complainant is to be considered a party to this proceeding, (and we think he is) knowledge is to be imputed to him of every thing he was entitled to know, and proper to be known, for a right decision in regard to a confirmation of the release, and thus being in possession of all proper and necessary information at the time of the dismissal of the bill, the complainant's act in thus dismissing the bill by agreement, and in his signature to the receipt above referred to, dated 7th February, 1834, are such recognitions of the act in question, as would amount to a confirmation of the release, considering it merely as a voidable release.

The great and leading object of the bill was to render the *Marshalls* liable for the alleged waste of the trust estate, by *John Forbes*, and for the alleged fraudulent alteration of the accounts. In accordance with this, is the complainant's declaration as proven to have been made to *Somerville*, that he did not believe *George Forbes* had any portion of his property, but that the *Marshalls* had, and that he was determined to make them pay for it. So far as the defendant was concerned, it is obvious from this that the complainant found no fault with the release he had executed.

We do not consider that any objection could be taken to the release, upon the ground that the compromise was founded on the appointment of *Mrs. Bond*. The court's decision with regard to this appointment, was known to the parties, and if they thought proper to waive any benefit which might accrue to any of them under this decision, it was surely competent for them to do so. That it was her wish and intention that the property should pass to her representatives in pursuance of this appointment is apparent, and this consideration would seem to make such an arrangement entirely proper, and if the complainant sanctioned it when he came of age, the release ought not to be affected by that fact.

The validity of this release on the ground of fraud, we think cannot be impeached. The alleged fraud consists in concealment, in alterations and erasures of the accounts, and in the alteration of the covers and labels on the books of the trust, whereby an examination of the books was rendered more difficult.

As to the charge of concealment, we consider it wholly unsupported by the evidence.

It is alleged secondly, as a ground of fraud, that a large item in the account of *James Forbes*, the father of the complainant, in the books of the trust estate kept by one of the original trustees, was erased, whereby his account was materially changed to the prejudice of *James Forbes*, and the complainant claiming under him. The answer of the defendant denies such erasure, and although it is sworn to by *Wheatly*, the whole proof in the cause induces us to believe that the erasure complained of did not exist. Examinations of the accounts of this trust estate, embracing the account of *James Forbes*, were made by skilful accountants, and by persons interested in detecting the erasure, if one existed, yet no such erasure was discovered, and *Judge Marshall* swears, that he saw no such erasure, and he could not perceive how such an erasure could have been made without bearing traces which would lead to detection, as the accounts were objects of close examination. The books were in *Washington*, taken thither expressly for the purpose of examination, preparatory to a compromise, and were examined by *Col. Ashton*, the counsel of the complainant and of his sister and brother-in-law, by *Mr. Webster*, the husband of *Miss Sothoron*, one of the persons entitled under the trust, and were particularly examined at the instance of *Judge Clement Dorsey*, by *Richard Dorsey*, an accountant; and were brought into court, where they remained for the inspection and scrutiny of all the parties interested, yet no erasure was at any time discovered. It is inconceivable that an erasure of the character charged, could have been committed, and under all these circumstances of vigilant scrutiny have avoided detection. It is equally extraordinary that the

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witness testifying to these erasures should have been from time to time in communication with the parties, and having full knowledge that a compromise of the claims of the respective parties was about being made, should have withheld information from them of a fact so important to the just distribution of the trust estate. During any of the examinations by the books, had by any of the parties or by the witnesses, no complaint of this kind has been made, and we consider the charge as disproved by the evidence.

We are therefore of opinion that the release of the 8th of June, 1831, is valid and binding on the complainant, and that he is not entitled to a decree for an account.

DECREE REVERSED AND BILL DISMISSED WITH COSTS.

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JACOB C. SMITH AND OTHERS *vs.* THE STATE OF MARYLAND.—*June*, 1847.

As between the State and the other general creditors of a deceased debtor, whose lands were sold for the payment of the debts, in consequence of the insufficiency of his personal property, neither having a lien, the State is entitled to a priority of payment out of the proceeds thereof over such other creditors.

APPEAL from the equity side of *Washington* County Court.

The bill in this cause was filed on the 2d November, 1843, by *J. C. Smith*, on behalf of himself and other creditors of *Joseph Weast*, and prayed a sale of his real estate for the payment of debts, in consequence of the insufficiency of personal estate for that purpose. A decree was passed for the sale on the 5th December, 1843; a sale was reported and ratified, and his creditors were notified to file their claims. The audit showed that the sales amounted to \$8224 25; and after deducting the expenses of sale and the widow's dower, awarded \$4232 44 to the appellee, \$2978 77 to *Hiram Weast*, executor of *Joseph*, for a balance due him on his final account,

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and which was credited by the payment in full of liens upon the real estate sold, and \$1013 14 rateably among general creditors, whose claims amounted to \$7805 05. The audit was excepted to,

1st. That the whole amount claimed by the State for taxes collected by *Joseph Weast*, and due the State, was allowed, when the State had no lien on the land sold.

2d. That the State was not entitled to any priority or preference in distributing the proceeds arising from said sales, and is only entitled to take *pro rata* with the other creditors of said estate, after discharging liens and incumbrances on the land.

3. That there were large sums due and uncollected, which should be collected by the executor and applied to the discharge of the liens allowed to him.

The county court, (MARTIN, C. J., and BUCHANAN, A. J.) considered that the right of the State to the priority in this case was sustained, overruled the exceptions, and decreed a ratification of the account.

The creditors appealed.

In this court the parties filed the following agreement:

It is agreed in this case, that *Joseph Weast*, late Collector of the State tax for *Washington* county, was at the time of his death, seized and possessed in fee of a valuable real estate lying in *Washington* county. That his personal estate was inconsiderable, and was exhausted in the payment of liens. A bill was filed in *Washington county court as a court of equity*, by his creditors, to sell his real estate for the payment of the debts due by the deceased; and after decree upon the answer and testimony in the usual form of a decree, for the sale of the estate of a deceased debtor, the trustee appointed sold the real estate and brought the purchase money into court for distribution amongst the creditors. There were large judgment creditors, and their judgments were allowed a preference over all other creditors, in the order of their respective dates.

The auditor gave the usual notice for claims against the deceased to be filed with him, and the attorney for the *State of*



*Maryland* filed the claim duly certified, which was due by the said *Weast*, as collector of the *State tax*, and directed the auditor to allow the same, after distributing a sufficient sum to extinguish all liens upon the said estate. The claim of the State was in the nature of an account for monies due by the said *Weast*, in the character of collector. It is admitted, upon this claim, *no judgment* had been obtained prior to the death of the said *Weast*. After the claim of the State had been allowed by the auditor, the balance of the money in the hands of the trustee was distributed amongst the other creditors, which made their distributions much less than if the State's claim had not been thus preferred. To this preference thus given the State over all other creditors who had no liens by judgments, the appellants objected, and filed their objections to the auditor's report, on the ground that the said fund in court, being the proceeds of the sale of the *real* estate of the debtor at the time of his death, and the State having no mortgage or judgment, or other lien, at the death of the debtor, she had no right to have her debt preferred over the other creditors who had no liens, but ought to have come in, *pari passu*, with these creditors. The State on the contrary, claimed a preference in the distribution, to the exclusion of all the other creditors of the said *Weast*, *except the judgment creditors*, and the court allowed this preference and confirmed the report of the auditor, and ordered the trustee to pay out the proceeds of sale accordingly. From this order this appeal has been taken; and the only question now presented for the decision of the court is, whether the State of Maryland is entitled to the preference thus claimed by her over the other creditors who are not judgment creditors.

If the court should be of opinion that the State is entitled to such preference, then the judgment of the county court will be affirmed. And if the court be of opinion that the State is not entitled to such preference, then the judgment of the court allowing such preference is to be reversed, and the auditor directed to distribute the said fund amongst the creditors, without allowing such preference to the State.



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Smith et al. vs. The State of Maryland.—1847.

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The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By TIDBALL and F. A. SCHLEY, for the appellants.

In this case a preference is claimed for the State on a mere specialty debt, (collector's bond,) the fund is the proceeds of the sale of land of which *Joseph Weast*, deceased, died seized, and which was sold by virtue of a decree of *Washington* county court as a court of equity; the personal estate of the decedent not being sufficient for the payment of his debts, the debt is not of record, and did not bind the land from the time of the debtor's becoming indebted; the *State of Maryland* has no other priority than the King had at common law. The *State of Maryland vs. The Bank of Maryland*, 6 Gill & Johnson, 205. The King's debts of record always bound the land of his debtor; but the King's debts, not of record, did not at common law bind his debtor's lands. 3rd *Bac. Abrid.*, title, Ex., letter K. The *Stat. of 33d Henry 8th*, ch. 39, by the provisions of which the lands were bound, has not been adopted in the *State of Maryland*, as appears by *Kilty's Report of Statutes*.

In *Chitty, Jr.*, on the Prerogative of the Crown, page 293, it is stated: "with respect to the time from which the lands of the debtor are bound by the crown debt, the general criterion and rule at common law seems to be, that the lien or claim obtains only from the time when the debt becomes of record, and is thereby presumed to be of public notoriety." The *State of Maryland*, it clearly appears from the foregoing authorities, had no lien on the lands of the decedent; and we naturally look to the course adopted by a court of equity under such circumstances. In *Birely and Holtz against Staley*, 5th Gill & Johnson, 432, 452,—the Court of Appeals quotes with approbation the following remarks of *Chancellor Kent*, speaking with reference to personal property: "the preliminary step which seems to be required, is that the judgment creditor should have made an experiment at law, and bound the property, by actually suing out execution." *Hendricks vs. Robinson*,

*2nd John. C. R.* Also in *Brinkerhoof vs. Brown*, *4th John. C. R.*, 677, which is quoted as referred to: "if he seeks aid as to real estate, he must shew a judgment creating a lien on such an estate; if he seeks aid in relation to personal estate, he must shew an execution giving him a legal preference." A court of equity creates no preferences, and no inequality arises from any principle of that court; but where a party has already acquired and gained in a court of law a lien, a court of equity will not deprive that party of an advantage or preference in a court of law, which he had previously acquired. In the case of *The State of Maryland* against *The Bank of Maryland*, heretofore referred to, the court ought to be understood to consider the case of *Murray and Sampson vs. Ridley*, administrator, as referring exclusively to personal property, as an administrator only represents personal property, and we do not deny a priority as to personal property. The case of *Contee vs. Chew's* executor is a case where a judgment (debt of record,) had been obtained during the life-time of testator; and the case of *The State vs. Rodgers and wife*, as growing out of the act of 1781, chap. 23, a *scire facias* having been issued by virtue of that act, and any preference or priority that the State acquired arose from its provisions. We contend, that there was not any lien on the land acquired by the State; and that therefore a court of equity will only consider the State as entitled, *pro rata*, with the other creditors of the decedent's estate.

By W. B. CLARK, D. A. G.

The *State of Maryland*, in this case, claims a priority after payment of all antecedent liens. The right is founded upon the common law principle of priority of payment to the Sovereign. In *6th Peters*, page 35, we find the following language: "The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law." The common law was adopted by our bill of rights, *State vs. Buchanan*, *5th Harr. & Johnson*, 317, 401.

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In the case of *The State of Maryland vs. The Bank of Maryland*, 6 *Gill and Johnson*, 205, the whole doctrine is reviewed by the court. The distinguished judge who delivered the opinion of the court, at page 226, remarks: "It is too late, therefore, at this day, to deny the State's right at common law, to have its debt first paid out of the property of its debtor remaining in his hands, and no lien in the way; for notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principle or spirit of our political institutions." Again, "the government of the State is established for the good of the whole, and can only be supported by means of its revenue, which revenue, the good of the whole requires to be protected. And as it can only act by its agents, who, no matter how vigilant, cannot be always present to protect its rights, a priority in the payment of its debts, (which must always be of a public nature,) is necessary to enable it to accomplish the end of its institution." See also on same point, *Black. Com.*, 178, 185; 5 *Cranch*, 299; 2 *Cranch*, 389; 6 *Binney*, 271.

Money in the hands of an administrator or trustee, applicable to the payment of the debts of a deceased person, after payment of all liens, whether derived from the sale of real or personal property, is a fund under the control of the court, and as amongst creditors must be distributed. The State, standing upon higher grounds in reference to other creditors, "whose claims are in equal degree," is entitled to receive her debt, agreeably to the auditor's account, which was ratified by the court below.

CHAMBERS, J., delivered the opinion of this court.

The argument of the appellant resists a proposition not involved in this case.

The question is not whether the land of the debtor is bound, as by a lien, which will pursue it in the hands of a bona fide purchaser, but whether as against creditors having no lien, the State is to be preferred in the distribution of the proceeds of a debtor's land, sold for the payment of his debts generally.

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The authorities, cited by the appellant, sufficiently proved that in such a case as the present, the State has no lien. None is claimed.

A priority of payment over other debts, they also not being liens, is a very different thing; and we think a prerogative of the State. That such is the case in respect to personal estate is admitted. The case of *The State vs. The Bank of Maryland* cannot be limited by any such distinction. The facts of that case in which the property in part was real estate, as well as the principles advanced in the opinion, apply conclusively to the case before us.

ORDER AFFIRMED.

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WM. F. WORTHINGTON AND ANNE HICKS vs. W. S. McPHERSON, *a. d. b. n. c. t. a. of* LEWIS NETH.—June, 1847.

The testator devised all the rest of his estate to be sold, and the money arising therefrom to be invested and to be held for the use of his child. The rest of his estate, of whatsoever kind, after deducting his wife's dower and thirds, he gave to his child. By a codicil he declared that with respect to the estate, which by his will is given to his child, it was his desire that in the event of his dying in infancy, that the estate provided for be given to *W. and H.*, and in that event, to be equally divided among them. The child died several years after the father, in infancy. *Held*, that the property devised to the child was that which existed at the testator's death; the profits upon its investment constitute no part of that estate; these are the fruits of the devise, belong to the child, and do not pass under the codicil.

APPEAL from the *Orphans Court of Anne Arundel County.*

The will of *Lewis Neth*, bearing date the 4th October, 1832, contains among others the following clauses, viz :

*Item.* All the rest of my real estate I desire may be sold, and I hereby authorize and appoint *Samuel Maynard* to make sale thereof, upon such terms as he may approve of, and also to execute deeds for the same when the purchase money is paid. The money therefrom arising to be invested by the said *Maynard* in some safe public stock or funds, and to be held for the use of my said child or children. *Item* : The rest of



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my estate, of whatsoever kind, after deducting therefrom my wife's dower and thirds, I hereby give to such child or children.

On the 7th October, 1832, the testator added this codicil:

*Item:* With respect to the estate, which by my will is given to the child or children with which my wife may now be pregnant, it is my desire, that in the event of no such child being born, or of the said child or children dying in infancy, that the estate provided for them be given to *Mrs. Anne Hicks, Mr. Wm. F. Worthington*, and my relation, *John Scott*; and in the events aforesaid, I do devise the same to them, and to be equally divided among them.

The appellee by his final account, charged himself with a debt collected, and interest to the 16th December, 1835, \$8162 22, and with further interest on the principal debt, \$5915 00, from 16th December, 1835, to the 20th April, 1846, \$3671 24; after sundry allowances, there remained in his hands, \$10,283 13, of which \$3494 38 was distributed to the widow of *L. N.*, leaving \$6788 75 for distribution under the will.

On the 30th October, 1846, the Orphans court, upon application to distribute the balance, passed the following order:

The court being informed that *Lewis Neth*, the only son and residuary legatee in possession, of the said testator, hath lately died under the age of twenty-one years; do, upon consideration, award and determine that the personal representatives of the said deceased legatee, is entitled to so much of the said sum, as is formed of interest accrued since the death of the testator; and the original debt, with interest accrued up to the time of the death of the testator, belongs to the persons to whom the estate is bequeathed by the testator's codicil, on the event which has happened; and it appearing reasonable that the costs of collecting and administering said fund, should be paid by the parties interested therein, in proportion to their respective interests; and that the sum due at the time of the death of the testator, was . . . . \$7038 37  
 And that the interest since accrued, to amount of 4795 09  
 Making, for principal and interest at the time of  
 payment thereof, . . . . \$11,833 46



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This court doth award and adjudge, that the balance distributable by the foregoing account, be paid and retained by the said administrator, as follows :

To be retained by him, the said <i>William S. McPherson</i> , as administrator of the said legatee, <i>Lewis</i> <i>Neth</i> , deceased, . . . . .	\$2601 15
To be paid to the legatees over, named in the codicil, viz :	
To <i>William F. Worthington</i> , . . . . .	1272 67 $\frac{2}{3}$
To <i>William F. Worthington</i> , as executor of <i>John Scott</i> , . . . . .	1272 67 $\frac{2}{3}$
To <i>Anne Hicks</i> , . . . . .	1272 67 $\frac{2}{3}$
To be retained by the said <i>William S. McPherson</i> , and accounted for by him as guardian of the deceased legatee, for costs already advanced by him as guardian, \$464 59 less 92 02	369 57
	<hr/> \$6788 75

The estate of the testator previously received by the administrator, having been retained by himself, as guardian to the deceased legatee. It is the opinion of this court, that he is accountable therefor to the administrator of the said deceased legatee, and is not to be charged therewith in this present account.

The parties who claimed under the codicil prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and SPENCE, J.

By REVERDY JOHNSON for the appellant, and

By ALEXANDER and McMAHON for the appellee.

ARCHER, C. J., delivered the opinion of this court.

The will of *Lewis Neth* was dated on the 7th October, 1832. The testator died a few days after the execution of his will and codicil. At the time of the death of the testator, his wife

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was pregnant, and in April, 1833, was delivered of a son. This son died in 1846.

The clauses of the will having reference to the question before us, will be found in the statement of this case.

The question presented for our consideration, is, whether the profits of the estate, devised contingently to the child, should, upon its death, pass to the personal representative of the child, or should pass over to those to whom the estate in remainder was limited?

The intention, it has been argued, is clearly evinced by the use of the word "estate" in the devise to the child, and to those in remainder; and it is urged that as the "*estate*" is left to the child, and the same word "*estate*" is used in describing what those in remainder should take; that if the child takes the property devised and the profits, that those in remainder should also take the property devised and the profits—to this the answer is apparent. The property devised to the child is the property as it exists at the time of the death of the testator. The profits constitute no part of such estate, but are fruits of the subject of the devise or bequest which spring up after the death of the testator, and which belong to the child in virtue of the devise of the property to it.

If this construction should prevail, although the testator manifestly intended a benefit to his child, it could get nothing. The profits having to pass over to those in remainder, the same could not be appropriated for the child. It is supposed, however, that the testator meant that what might be necessary for the child's support and maintenance might be appropriated. We perceive nothing in the will to indicate such an intention on the part of the testator.

The effect of such a construction would be to pass over the profits, though the child of the testator might leave children, such clearly could not have been his design.

Again, it has been argued that the testator did not mean to enlarge the bounty to his wife by any contingency which might occur; and that no construction should be given to the will which would have the effect on the death of the child to enable

her, as the representative of the child, to take the profits. She would not, on the death of the child, take from the testator, by the devise, but would take as heir to the infant devisee, and would therefore take nothing under the will; and there is certainly nothing on the face of the will to indicate that the profits of the estate should rather go to those in remainder than to the wife.

It has been further urged, that if no child had been born, the profits would have gone over to those to whom the estate was limited in remainder, in virtue of the word "estate," and that a different construction cannot be given to the words if a child should be born. If no child had been born, the profits would pass as the fruits of the estate devised on the failure of the contingency; but if the contingency contemplated occurred, then the estate devised rested in the child, and the profits would belong to the child.

There is nothing therefore in the terms of the will to indicate an intention on the part of the testator to devise to the child, on the event of its dying under twenty-one years, only so much of the profits as might be necessary for the maintenance of the child.

The authorities cited clearly demonstrate that the estate left to the unborn child, became on the birth of the child, by the terms of the will, a vested estate, which carries the profits, and there is no intention discoverable from the will to defeat the rule of law. We need not comment on the authorities cited; for it was conceded in the argument, that they established the principle contended for by the appellee; but it was insisted, that the profits should not pass in a case, where the intention was clear, to the contrary; and that the legal intent ought to yield to the actual intent. We have endeavored to show that the actual intent does not differ from the legal intent.

It has been further argued, that all the profits of the estate, arising between the death of the testator, and the birth of the infant, should pass over to those in remainder. But we feel satisfied that such profits ought to be allowed to accumulate for the benefit of the child.

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Wilson vs. Turpin.—1847.

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**JACOB WILSON vs. FRANCIS B. C. TURPIN.—June, 1847.**

The decisions of the Supreme Court of *The United States* are of conclusive force and effect when deliberately formed and expressed on a question of construction of the Constitution of *The United States*, or of an Act of Congress made pursuant thereto.

A vendor of land not being paid the price in full, made a conveyance to his vendee, who afterwards became a bankrupt under the laws of *The United States*. The vendor then filed his bill in Equity to enforce his lien for the balance due him, against a purchaser with notice from the assignee of the bankrupt. *Held*, that the vendor would have had full remedy *in the case* in the District Court of the United States, as an incumbrance on the premises sold, and that the title of the purchaser from the assignee could not be disturbed under this bill.

The assignee has authority to administer the assets of a bankrupt, whether real or personal, and especially to sell mortgaged estates, and of course to pass a title to the purchaser, in every case where the jurisdiction of the State Court had not attached.

**APPEAL from the Court of Chancery.**

The bill in this cause was filed on the 18th Dec., 1843, by the appellee, and alleges that in the year 1841, your complainant sold and conveyed by deed to a certain *Thomas Smoot*, for, &c., a certain mill, and mill-seat. That the said *Thomas Smoot* has had the possession, and has paid to your orator in sundry ways all of the said purchase money, except the sum of, &c., which your orator charges was due and unpaid on the 9th May, 1842, and yet remains due and unpaid with interest. That the said *Thomas Smoot* having become insolvent and bankrupt, and having been so decreed, upon his application to the District Court of the United States, for the Maryland District, a certain *William W. Laird* was, by order of the said court, appointed assignee, in bankruptcy, for the said *Thomas Smoot*, and the said *William W. Laird* as assignee, or agent as aforesaid, and with the consent of the said *Thomas Smoot*, has made sale of all the right and title of the said *Thomas Smoot*, in, and to the said property; and at said sale, a certain *Jacob Wilson*, of said county, has become the purchaser and highest bidder for the said property, for the sum of, &c., and has taken possession of the said property, and



now holds and claims the said property from and under the said *Thomas Smoot* as aforesaid. Your orator charges, that public notice was given at the said sale of the said assignee, or as agent of said *Smoot*, that your orator had a claim upon the said property, for the balance aforesaid of the purchase money, due as aforesaid. That the said *Jacob Wilson* became a purchaser of the said property as aforesaid, from and under the said *Thomas Smoot*, with knowledge that your orator held the claim as aforesaid upon the said property, for the balance of the purchase money. Prayer for a sale to enforce and satisfy the lien, &c.

The answer of *Jacob Wilson* admitted the sale to *Smoot*, but was ignorant how much, if any, of the purchase money was unpaid; and also admitted that said *Smoot* did become a bankrupt, that *William W. Laird* was appointed his assignee, and after giving bond as such, set up to auction, and sold clear of all incumbrances, the said property, when this respondent became the purchaser thereof; that by such sale all the rights and liens of said *Turpin*, if any he had, have been extinguished, and that his only redress is from the purchase money now in the hands of the said assignee. This respondent expressly denies that he heard said *Turpin*, or any one else, at said sale, or before, assert that he, said *Turpin*, had any claim to or upon said property, although said *Turpin* may have announced that statement; but he submits that if he did so, still said property was sold clear of all liens or incumbrances; and that said *Turpin's* only redress is from the assignee in bankruptcy; and that such has been the decision in the courts of the *United States*. That said *Smoot* has either paid or secured the whole of the purchase money of said property to said *Turpin*, and that thereby, as respondent is advised, the liens of said *Turpin* have been extinguished.

After proof taken, which is not material in reference to the question decided by this court, the Chancellor (BLAND) on the 17th February, 1846, decreed the property to be sold for the payment of the complainant's claim—from which the defendant below appealed to this court.



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The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By R. JOHNSON for the appellants, and

By C. McLEAN for the appellee.

CHAMBERS, J., delivered the opinion of this court.

This court is relieved from the necessity of any elaborate discussion of the provisions of the bankrupt law of the United States, and its true construction as far as it regards the question involved in this appeal.

The decisions of the Supreme Court of the United States, at all times, and on all subjects, entitled to the most respectful consideration, are, we think, of conclusive force and effect when deliberately formed and expressed on a question of construction of the Constitution of the United States, or of an Act of Congress made pursuant thereto.

It is the opinion of the court, that the bankrupt law, under which the appellant claimed to exempt the real estate purchased by him at the sale of the assignee, must avail him according to the cases reported in 3 *Howard*.

In the case *ex parte Christie*, Mr. Justice Story pronouncing the opinion of the court, says: "the district courts possess jurisdiction to suspend proceedings in the State courts then pending, or thereafter to be brought, by any creditor or person having adverse interests against the bankrupt, or his assets after bankruptcy." See page 318; and he instances the case of suits brought in the State courts by various mortgagees to enforce their several liens, as an illustration of the evils that would attend a contrary construction; after enumerating which, he says in 319—"all this, however, is completely avoided by bringing the whole matters in controversy between all the mortgagees before the district court or circuit court, making them all parties to the summary proceedings in equity, and thus enabling the court to marshal the rights, and priorities, and claims of all the parties; and by a sale and other proceedings, after satisfying the just claims of the mortgagees, applying the residue of the assets, if any, for the benefit of general creditors.

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The same doctrine is announced in the subsequent case of *Norton's assignee vs. Boyd et al. in the same vol., page 437*—and the judge who had expressed a dissenting opinion in the first case in giving his views in *Norton's assignee vs. Boyd, in page 440, says*: “That a mortgage can be foreclosed in the bankrupt court, and the lien given by it preserved there, I have never doubted if the jurisdiction of the State court had not attached, and was not ousted by the proceedings in bankruptcy.”

Both those were cases in which the State courts had actually assumed and exercised jurisdiction before the petition of the bankrupt. The court in each, and after elaborate argument, decide that the district court has the authority, as the circumstances of the case may demand, to interpose and claim exclusive jurisdiction, or allow the proceedings to be consummated in the State courts. But the unquestionable result of both decisions, is to clothe the assignee with ample authority to administer the assets, whether real or personal; and especially to sell mortgaged estates, and of course, to pass a title to the purchaser in every case where “the jurisdiction of the State court had not attached.”

The appellee in this case had full remedy in the district court, and would doubtless, on a proper application there, be treated as an incumbrancer upon the premises sold.

As an equitable mortgagee, he held a specific lien on the premises sold, in the hands of his vendee, and in the hands of any voluntary assignee, or an assignee taking by force of a legal proceeding, which entitled him to have his lien enforced against the proceeds of the mortgaged premises, precisely, as if it had been an actual mortgage regularly acknowledged and recorded.

If the property has produced less at the assignee's sale than it should or could have been sold for, it is a consideration which cannot affect the question of jurisdiction.

DECREE REVERSED, AND BILL DISMISSED WITHOUT COSTS.

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Flickinger vs. Hull.—1847.

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**JOHN FLICKINGER vs. PETER HULL.—June, 1847.**

In 1821 *S.* was appointed guardian, and gave bond with *F.* and *H.* as his sureties.

In 1825 *S.* died insolvent, and in debt as guardian. *H.* was appointed his successor, and *F.* became his surety. The second guardian before he had received any part of his ward's funds, charged himself with the balance due from his predecessor. In 1845, the infant sued the second guardian's bond, and recovered judgment against *H.* and *F.* when the second guardian paid the ward a greater sum than he had received in fact from the first. The ward then assigned the judgment to *F.* who was about to sue out execution against *H.* for the whole judgment, though he had in fact, but paid a part of it. Held,

1. Whether one surety can sue another security to the same instrument, for contribution in a case where the plaintiff by a change of his relation, had only made himself constructively liable for the debt secured. *Qr.*
2. That the claims between the co-sureties having become complicated by sundry payments and receipts, and on adjusting which, accounts would be necessary to show the true payments, made a case for equity.
3. That a surety who had become constructively liable at law to the principal creditor by charging himself with sums he had not in fact received, would not be concluded in equity as related to his co-surety originally liable for contribution by his admission, where a remedy suitable to the circumstances of the case would be extended.
4. It being admitted that there was a balance due from *S.* the first guardian, for which *H.* and *F.* were both liable, that *H.* had not received it in fact, and *S.*'s estate insolvent, made a case for contribution, and against equity for *F.* to endeavour to recover the whole amount of the judgment recovered against him and *H.*
5. When a party applying for an injunction admits that he owes a balance to the person to be enjoined, the court may require such balance to be brought into court to be paid accordingly.

Where a guardian dies insolvent, and his surety is appointed his successor, and charges himself with the balance due the ward from the first guardian, this makes the second guardian liable to the ward.

Where a person in one character is debtor, and the same person in another character is creditor, the law regards the debt as paid by the debtor capacity to the creditor.

Where a man has several capacities, and is found in possession of property, the law will attach the possession to the capacity in which of right it ought to be held.

So also, where having different capacities, he executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the person does not profess to exercise it in virtue of that particular power.

APPEAL from the equity side of *Carroll* County Court, from an order continuing an injunction.

The bill in this cause was filed by the appellee on the 1st October, 1845, and alleged that about the year 1820 *Jacob Snyder* was appointed by the Orphans court of *Frederick* county, guardian to *Matilda Flickinger* an infant, who has since intermarried with one *Reuben Rachner*, and that your orator and one *John Flickinger* became the securities in the guardian bond of said *Snyder*, which bond was executed on the 1st May, 1820; that the said *Jacob Snyder* died about the year 1825, and that at the time of his death he was indebted as guardian as aforesaid to his said ward, in the sum \$2,036 31. That after the death of the said *Snyder* it was believed and understood by the said *Flickinger* and your orator, upon consultation between them on the subject, that they would be compelled to lose a considerable amount of the sum so due from said guardian to said ward, as they believed the estate of the said *Snyder* to be insufficient to pay his debts, and it was thereupon agreed by the said *Flickinger* and your orator, that he the said *Flickinger* should become the guardian to the said ward, and that your orator should become his security in the guardian bond, and that they should be equally responsible for the amount of said account settled by said *Snyder*, and should pay the amount thereof in equal proportions, whenever the same should be demanded by said ward after she had attained majority, and that the said *Flickinger* should recover from the estate of said *Snyder* whatever he might be able, which should be applied to the payment of said amount to said ward, and that the deficiency which would be the loss to your orator and said *Flickinger* should be equally borne by them in equal and even proportions; that the said *Flickinger* and himself went together to *Frederick city* for the purpose of carrying out the aforesaid agreement, by applying to the said Orphans court for the appointment of *Flickinger* as guardian as aforesaid, and that after they had reached *Frederick* the said *Flickinger* proposed to your orator, that as your orator was more conversant with the business of the kind, he, your orator, should become the guardian, and that he, *Flickinger*, would become his security, and that the same agreement should exist, that is



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to say, that he the said *Flickinger* and your orator, should be equally bound for the amount due to said ward, and should pay the same in equal proportions as aforesaid, and that the amount which might be recovered from the estate of said *Snyder* should be for the equal benefit and relief of said *Flickinger* and your orator; and your orator states that it was distinctly understood and agreed between them, that their liability as securities in the bond of said *Snyder* should be in no degree altered or changed, and that the arrangement aforesaid was with the view, and for the purpose of having for themselves the benefit of the time which would elapse before the coming of age of the said ward, and also for the purpose of recovering whatever they might be able from the estate of said *Snyder* before they could be called on to pay said money. That in pursuance of the agreement aforesaid, himself and the said *Flickinger* applied to the said Orphans court for the appointment of your orator as guardian as aforesaid, and that your orator was appointed by said court guardian as aforesaid, sometime in the early part of the year 1826, and on the same day on which his bond as guardian bears date; and that on the 8th *February* in said year he entered into bond as such guardian with the said *John Flickinger* as security, and that two securities being required by said Orphans court, one *John Daugherty* who was present, offered to become the remaining security, and did so become. That afterward, to wit: on the 16th May, 1831, another bond was given by your orator as guardian as aforesaid, in which bond the said *John Flickinger* and *John Slyn* became securities, and your orator alleges and states, that at the time the said last mentioned bond was executed the same agreement and understanding aforementioned existed between said *Flickinger* and your orator, and was distinctly and expressly recognized by said *Flickinger*; and your orator further shews to your Honors, that he proceeded to recover whatever amount he could from the estate of said *Snyder*, and that he has at different times, recovered and received from the administrator of said *Snyder*, in all, the sum of \$1588 10. That the estate of said *Jacob Snyder* the former guardian as aforesaid, was and



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is insolvent. That in pursuance of the understanding and agreement aforesaid, between said *Flickinger* and your orator, he proceeded soon after he had been appointed guardian as aforesaid, to settle an account in the Orphans court of *Frederick* county aforesaid, in which account he charged himself with the knowledge and concurrence of the said *Flickinger*, with the whole amount due from said *Snyder* to said ward, although at that time he had not received one cent of said amount, and that he proceeded from time to time to settle accounts in said Orphans court, charging himself with the whole of said amount, and the accumulating interest thereon, until the 26th February, 1835, when he settled a final account in said Orphans court, when the said sum with the interest thereon, amounted to the sum of \$3905 67.

And your orator further shews to your Honors, that although he has received and recovered from the estate of said *Snyder* in all but the sum of \$1588 10, he has paid to the said ward since she had attained majority, at various times, from the 2nd February, 1839, to the 21st November, 1842, various sums amounting in the whole, with interest up to the said last mentioned day to the sum of \$2779 82, out of the monies which he had so received as aforesaid from the administrator of said *Snyder*, and out of his own private funds, and that not one cent of said sum has been paid by said *Flickinger*; that the *State of Maryland*, for the use of the said *Reuben Rachner* and *Matilda* his wife, the said *Matilda* being the ward aforesaid, recovered at the April Term of *Carroll* county court, 1845, a judgment against your orator and the said *John Flickinger*, for the sum of \$3129 75 with interest, &c. of the said amount so due to her as aforesaid, after having allowed all the payments so made to her as aforesaid by your orator, that since the rendition of said judgment he has paid thereon, in all the sum of \$1270 00; that on the 9th July, 1845, a writ of *fiery facias* was issued on said judgment, under which said writ the sheriff of *Carroll* county seized and levied on the personal and real property of the said *John Flickinger* and your orator for the satisfaction of said judgment, and that after

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said seizure and levy, and advertisement of sale of the property levied on, the said writ of *feri facias* was countermanded by the order of the said *Reuben Rachner*, all which will appear from a copy of said writ, and the sheriff's return thereon endorsed; and that afterwards, to wit, on the 16th August, in the year aforesaid, a pretended assignment of the said judgment was executed by the said *Rachner* and wife, for whose use the said State sued the said *John Flickinger*, as will appear from a copy of said pretended assignment herewith filed; and also a copy of an agreement between said *Reuben Rachner* and said *Flickinger*, herewith filed.

And your orator states that a particular statement of the amounts so paid by him as aforesaid, with the interest thereon up to the date of the said judgment, and of the amounts paid by him since said judgment, as well as the amounts so received by him from the estate of the said *Snyder*, shewing the condition of the account as between the said *Flickinger* and your orator is herewith filed; that the said *Flickinger* pretends that by virtue of the aforesaid assignment of said judgment, and the act of assembly of October session, 1763, chap. 23, sec. 8, he is entitled unto and can have in his own name as assignee, the same execution against your orator as the principal debtor in said judgment, that the plaintiff in said judgment might or ought to have had, if said assignment had not been made. And your orator is informed and verily believes, and therefore states that said *Flickinger* is about to sue out of *Carroll* county court, as a court of law, an execution against your orator for the whole amount of said judgment, including interest and costs, after deducting therefrom and giving credit for the said sum of \$1270 00, so paid by your orator as aforesaid, since the date of said judgment. Whereas your orator is advised and humbly insists that the said pretended assignment of said judgment not having been made by the legal plaintiff on the record, does not entitle the said *Flickinger* to sue out an execution as aforesaid and also that the facts, agreements and circumstances hereinbefore set forth in equity and good conscience, debar the said *Flickinger* from having any execution

whatever against your orator on said judgment, and that whatever may be the relative rights of said *Flickinger* and your orator, as regards principal and security in the aforesaid guardian's bond on which judgment has been obtained as aforesaid, the simple fact, that your orator as guardian charged himself with the whole amount of money due the said ward from *Snyder*, the said former guardian, and thereby exonerated as well the said *Flickinger* as your orator, from great loss and responsibility as securities in said guardian bond as aforesaid, is in equity and good conscience a defence to your orator against all claims by said *Flickinger*, founded upon his being only a security in the aforesaid guardian bond of your orator, as also the additional fact that after the said *Flickinger* had refused as aforesaid to become the guardian of said ward, your orator at the instance and request of the said *Flickinger* assumed the said guardianship, and charged himself in the said Orphans court of *Frederick* county, with the entire amount of the indebtedness of the said former guardian for the express purpose of relieving said *Flickinger*, as well as your orator, from loss and responsibility, and immediate accountability as securities of the said former guardian, and upon the express agreement between your orator and said *Flickinger*, that he would contribute equally with your orator in making up the amount which might be coming to said ward by reason of the insolvency of the estate of said *Snyder* after said ward should have arrived at age.

And your orator charges that for the said *Flickinger* to proceed to recover from your orator by execution on said judgment, the money which he may have paid on said judgment, would be to practice a fraud on your orator, which the principles of equity forbid, and would be also in violation of said *Flickinger's* agreements solemnly entered into with your orator, but which your orator cannot enforce at law, in case said *Flickinger* is permitted to sue out execution as he is about to do against your orator on said judgment, unless enjoined.

The complainant filed with his bill various exhibits, viz:

The third account of *Jacob Snyder* as guardian to *M. F.*,

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showing a balance due the ward, 4th November, 1822, \$2036 31.

The guardian's bond of 8th February, 1826, executed by complainant and defendant, and one *John Daugherty*.

The guardian's bond of 16th May, 1831, executed by complainant and defendant, and *John Slyn*. Penalty \$6000.

The account of *John Snyder*, administrator of *Jacob Snyder*, 26th November, 1825, balance \$798 29. 2nd account, balance \$329 01.

The first account of *Peter Hull* as guardian, 4th November, 1825, balance \$2276 14, due his ward.

The eighth and final account of same, 26th February, 1835, balance due the ward, \$3905 67.

Receipts of *Matilda Flickinger*, 1839, \$830. 1842, \$63. \$155. \$1539 50.

Judgment. *The State use of Reuben Rachner and Matilda* his wife vs. *Peter Hull* and *John Flickinger*, on bond of 16th May, 1831, for \$3129 75 and costs. Cr.—By *Peter Hull*, \$900, \$250. 25th August, 1845, balance due on this judgment assigned to the use of *John Flickinger*; 9th July, 1845, *fi. fa.* issued; 26th July, 1845, *Peter Hull* pays \$120 on the *fi. fa.*, and plaintiff countermands the writ.

Assignment of judgment, *R. R. & wife* to *Peter Hull*, 16th August, 1845. It was then agreed that the assignment to *John Flickinger*, conveyed to him the entire amount of the plaintiff's claim, as per the judgment, except the sum of \$120, now in the sheriff's hands, and credits entered on the judgment.

Statement of claims paid by complainant as guardian to *M. F.*, and of the receipts by him from the estate of *Jacob Snyder*. Payments, \$4418 80. Receipts, \$2791 35.

The answer of *John Flickinger* admitted, that about the year 1820, *Jacob Snyder* was appointed guardian to *Matilda Flickinger*, then an infant, and who has since intermarried with *Reuben Rachner*; and that the said complainant, and this defendant, became the securities in the guardian bond of said *Snyder*. He admits that the said *Jacob Snyder* died about the year 1825, in the *State of Pennsylvania*, where he resided



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at the time of his death; and at that time he was indebted to his ward in the sum of \$2036 31. But this defendant saith it is not true, that after the death of the said *Snyder*, it was believed and understood by this defendant and said complainant, upon consultation between them on the subject, that they would be compelled to lose a considerable amount of the sum so due from said guardian; or, that they believed the estate of said *Snyder* to be insufficient to pay his debts; or that it was thereupon agreed by this defendant and the complainant, that this defendant should become the guardian to the said ward, or that the said complainant should become his security in the guardian bond; or that they should become equally responsible for the amount of the account settled by said *Snyder*; or should pay the amount thereof, in equal proportions, whenever the same should be demanded by said ward after she had attained majority, or at any other time; or that this defendant should recover from the estate of said *Snyder* whatever he might be able, to be applied to the payment of said amount to said ward; or that any deficiency should be equally borne by the said complainant and this defendant, in even and equal proportions. He further denies that he and the said complainant went together to *Frederick city*, for the purpose, or with a view of carrying out any agreement whereby this defendant was to become guardian of said ward; or that the said complainant was to become security for this defendant in his bond as such guardian; or that they, the said complainant and this respondent, went together to *Frederick city*, for the purpose, or with a view of applying to the *Orphans court* of *Frederick county* for the appointment of this defendant as guardian to said ward; and this defendant denies and saith, that it is not true that he ever proposed to the said complainant, that he, the said complainant, should become the guardian to said ward; and that this defendant would become his security; or that when this defendant did become security for the said complainant in his guardian bond as guardian of said ward, to wit: on the 8 Feb., 1826, that any agreement existed whereby this defendant and said complainant should be equally bound for the amount due



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to said ward; or that they should pay the same in equal proportions, as stated in the complainant's bill; or that the amount which might be recovered from the estate of said *Snyder* should be for the equal benefit and relief of this defendant and the said complainant; or that there was any understanding or agreement between them, the said complainant, and this defendant, with regard to their liability as securities in the said guardian bond of said *Snyder*; or that this defendant ever expected any benefit or advantage by becoming security for said complainant in his guardian bond aforesaid. This defendant avers, that during the period which elapsed between the death of said *Snyder*, and the day on which this defendant accompanied said complainant to *Frederick city*, for the purpose of becoming one of his, the said complainant's securities, in his first guardian bond, this defendant and said complainant had but one conversation on the subject, and that occurred when the said complainant, after said *Snyder's* death, called on this defendant, and suggested that he, this defendant, might become the guardian for said ward, and voluntarily offered to become one of this defendant's securities, if he, this defendant, were disposed to become such guardian; but this defendant said, he was not acquainted with such business, and had no inclination to become the guardian of said ward. Whereupon, said complainant expressed his willingness to become the guardian himself, and requested this defendant to become his security; but this defendant was not disposed to become security for the said complainant as such guardian, and did not consent to do so until said complainant represented to him that if he, the said complainant, did become guardian, he could invest the money in his, the said complainant's tan-yard, and extend his business, and realize handsome profits, or he would buy land with it; and that he was quite confident, that he, the said complainant, could pay the money whenever it would be required to be paid to the said ward; and that *John Daugherty* (who then resided in the neighborhood, and was in good circumstances, and a responsible man,) was willing to become one of his, the said complainant's securities, in the bond which he, the said com-

plainant, would be required to give as such guardian as aforesaid, if this defendant would consent to become the other security. And that it was upon these representations, and at the solicitation of said complainant, that this defendant consented to become one of the securities in said complainant's guardian bond as aforesaid; and this defendant saith, that he consented to become security as aforesaid, on the condition that the said *John Daugherty* should become one of the securities, and that with this understanding, he, this defendant, went to *Frederick city* with the said complainant; but does not now recollect whether the said *Daugherty* went in company with them or not; but the said *Daugherty* was present when the said complainant entered into bond as the guardian of said ward, and became one of his, the said complainant's, securities, in said bond. This defendant further saith and avers, that he was never apprehensive or fearful of sustaining any loss in consequence of his being security for said *Jacob Snyder* in his guardian bond; for he was under the impression and belief, that the said *Snyder's* estate was solvent, and the said complainant, after he became the guardian for said ward, frequently represented to this defendant, that the said *Snyder's* estate was solvent, or very nearly so; and this defendant, before he became security for the said *Jacob Snyder* in his said guardian bond, and consideration of his becoming such security, he was indemnified in the sum of \$3200, by the joint or joint and several bond of said *Jacob, Henry, and John Snyder*. But after the death of *John Daugherty*, who was co-security with this defendant in the guardian bond, to wit: about the year 1831, there being a report, &c.; and the said complainant proposed to this defendant, that he, the said complainant, would give a bond in which one *John Slyn*, who was then in said city, would become co-security with this defendant—to which proposition this defendant acceded, and the bond was accordingly executed. And this defendant denies that any agreement or understanding existed between said complainant and this defendant, when the bond last aforesaid was executed, whereby they were to be equally liable or responsible for any loss that

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might be sustained in consequence of the insolvency of the estate of said *Jacob Snyder*, or otherwise; or that this defendant was other than a security for said complainant in said bond.

And this defendant further answering, saith, that he does not know what amount the said complainant received or recovered from the estate of said *Snyder*, the former guardian of said ward: but states, that it appears from the account and distribution stated by auditors, duly appointed by the Orphans court of *Adams* county, in the State of Pennsylvania, that the said auditors allotted, assigned, or directed to be paid to the said complainant as guardian for said ward, the sum of \$2096 57, by *John Snyder*, the administrator of said *Jacob Snyder*.

And this defendant has been informed, and believes, and so states, that the said complainant received or recovered the aforesaid sum from the estate of the said *Jacob Snyder*. That the said complainant also received the sum of \$308 44, as guardian for the said ward, from this defendant, as executor of *Andrew Flickinger*, late of *Frederick* county, deceased. That he was not advised or informed of the said complainant's settlement or settlements with the said Orphans court of *Frederick* county, as guardian of said ward, and denies that it was with the knowledge and concurrence of this defendant that the said complainant charged himself with the whole amount due from said *Snyder* to said ward; but this defendant believes that he did so, under the impression that said *Snyder's* estate was perfectly solvent; and this defendant does not know whether the said complainant had then received anything from the said *Snyder's* estate or not. That he does not know, but believes and admits that the said complainant paid to the said ward since she attained majority, &c.

This defendant further answering saith, that he admits that the said *Reuben Rachner* and *Matilda* his wife, in the name of the *State of Maryland*, for their use, recovered at the April term of *Carroll* county court, 1845, a judgment against the said complainant and this defendant for the sum of \$3129 75, with interest, and the balance due her from the said complain-

ant as her guardian as aforesaid, after allowing all the payments which the said complainant had made to her as aforesaid; and this defendant states that the suit in which the aforesaid judgment was obtained, was brought on the aforesaid guardian bond of said complainant, in which this defendant and the aforesaid *John Slyn* were securities for the said complainant, as this defendant has hereinbefore stated; and this defendant admits that since the rendition of said judgment, the said complainant has paid thereon, in all the sum of \$1270 00. And this defendant admits, that on the ninth day of July, 1845, a writ of *fieri facias* was issued on said judgment, and that under said writ the sheriff of *Carroll* county seized and levied on the personal and real estate of said complainant and this defendant, and that the said property was advertised by the said sheriff, and that after the said levy and advertisement, the said writ of *fieri facias* was countermanded by the order of said *Reuben Rachner*.

And this defendant further answering, saith, he denies that there was any pretended assignment of said judgment to this defendant by the said *Reuben Rachner* and wife, but this defendant states and avers that inasmuch as his personal and real property was seized and levied upon and advertised for sale by the sheriff of *Carroll* county as aforesaid, this defendant to save his said property from sacrifice, as said complainant's security, paid on the whole balance then remaining due on said judgment and writ of *fieri facias*, to wit: the sum of \$2378 75; and in consideration thereof, and of this defendant being only security for said complainant in the bond on which said judgment was obtained as aforesaid, and by virtue and force of the act of assembly in such case made and provided, the said *Reuben Rachner* and *Matilda Rachner* his wife, the said *Matilda* being the ward aforesaid, executed an assignment of said judgment to this defendant; that inasmuch as the said complainant had paid to the sheriff aforesaid the sum of \$120 00 after the aforesaid writ of *fieri facias* came to the hands of him, the said sheriff, this defendant and the said *Reuben Rachner*, with a view to avoid any error or mistake,



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signed an agreement setting forth that the said complainant should have credit for the said \$120 00, as well as the several sums which the said complainant had paid on the said judgment before the said writ of *fiery facias* was issued.

And this defendant states that he is advised that he, this defendant, by virtue of the aforesaid assignment and the act of assembly of 1763, chap. 23, is entitled unto and ought to have in his own name, or in the name of the *State of Maryland*, for his use, the same execution against the said complainant as the said *R. R.* and *M. R.* his wife, or the said *R. R.* and *M. R.* his wife in the name of the *State of Maryland*, for their use, might or ought to have had, the said assignment having been recorded in *Carroll* county court, it being the same court in which the said judgment was rendered or obtained: and this defendant is advised and humbly insists, that inasmuch as he, this defendant, was security for the said complainant in the bond on which the said judgment was obtained; and inasmuch as he, this defendant, paid the balance, and on the said payment and the plaintiffs in the said judgment has assigned the same to him, this defendant, in consideration of his having so paid them said balance, this defendant is entitled to and ought to have execution for the said balance still remaining unpaid by the principal debtor, who is the said complainant. And this defendant prays that the injunction heretofore granted in this cause may be dissolved.

Various exhibits were filed with this answer.

At the September term, 1846, the cause having been submitted on a motion to dissolve the injunction,

The county court, *DORSEY*, C. J., and *BREWER*, A. J., passed the following order:

The bill states that the complainant and defendant became sureties for one *Jacob Snyder*, as guardian for *Matilda Flickinger*; that *Snyder* died indebted to his ward in the sum of \$2036 31 $\frac{1}{4}$ , for which sum the complainant and defendant were equally responsible, and which they would eventually have to pay to the extent of the insolvency of the estate of said *Snyder*. That under these circumstances it was agreed between the complain-



ant and defendant, that the complainant should become the guardian for said *Matilda Flickinger*, with the defendant as his surety, for the purpose of recovering from the estate of said *Snyder* so much of said debt as it would be able to pay, and appropriating it to the relief of said sureties, each of them undertaking to pay his proportion of the deficiency, and that in pursuance of said agreement, the complainant became such guardian with the defendant, as one of his sureties, passed an account charging himself with the whole of his ward's estate, as if received. That the complainant afterwards recovered from *Snyder's* estate, a part of the debt, and paid over divers sums of money to the ward after she became of age, leaving, however, a residue, for which the ward and her husband recovered judgment against the complainant and his sureties in *Carroll* county court, and upon which judgment, he, the complainant, paid other sums of money, and a *fi. fa.* having been issued and laid upon the defendant's property, the defendant paid what remained due upon the judgment, took an assignment of it under the act of 1763, and was proceeding to levy the whole on the complainant, without regard to what was due on his original responsibility as one of the sureties of *Jacob Snyder*. The answer of the defendant, admits his original responsibility as one of *J. Snyder's* sureties, that the complainant became the guardian after his death, and received and paid the sums of money stated in the bill, but denies that the complainant became guardian at his instance, or that he agreed to pay his proportion of the deficiency; on the contrary, the defendant professed to have felt no interest in the matter, as he alleges that he had a good bond of indemnity which would have secured him from any eventual loss, or a deficiency of *Snyder's* estate, which is admitted.

We do not see upon what ground the defendant claims a dissolution of the injunction. His original, co-equal, responsibility, with the complainant as one of the sureties in *Snyder's* bond, is admitted; and how is he released from that responsibility? Although he did not agree that the complainant should become guardian and charge himself with the whole debt due

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from *Snyder*, that they might by the delay, be enabled to recover from *Snyder's* estate before they should be compelled to pay, he was equally benefitted by it as if he had so agreed, and can hardly mean to contend, that the complainant by charging himself with the whole amount, assumed the whole responsibility, to his the defendant's exoneration, in the face of the fact, that he had then received none, and subsequently received only a part. We are not aware of any principle of law or equity that would release him on such grounds. That he has a bond of indemnity, cannot release him. If that could have any effect in the case, it would rather tend to create an equity in favor of the complainant. An undue importance seems to be attached to the alleged agreement of the defendant. His responsibility as a co-security was antecedent to, and entirely independent of it, and has not, so far as we can perceive, ever been discharged. Injunction continued until the final decree or further order.

The defendant appealed to this court.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By PALMER for the appellant, and

By W. P. MAULSBY and REVERDY JOHNSON for the appellee.

CHAMBERS, J., delivered the opinion of this court.

The bond of *Hull*, as guardian, and the fact of his charging himself with the amount due from *Snyder*, the former guardian to whom he was security, made him responsible to the ward for that amount. Where a person in one character is debtor, and the same person in another character is creditor, the law regards the debt as paid by the debtor capacity to the creditor.

This is on the same principle which governs in the case where a man has several capacities, and is found in possession of property, the law will attach the possession to the capacity in which, of right, it ought to be held; so also, where having

various capacities, he executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the person does not profess to exercise it, in virtue of that particular power. It is said that this being, so far as the ward was concerned, equivalent to an actual payment by *Hull*, would entitle *Hull* to claim contribution from *Flickinger*, if at all, at that time, and by a suit at law. How far a principal in a bond, who had charged himself in the Orphans court with the receipt of a sum of money, could in a court of law, recover against a security on his own bond, upon the ground that the money was not received in fact, but only charged because both the principal and that surety were co-sureties of the former debtor, and therefore equally liable, might be a very questionable matter. Certainly the learned counsel has not produced such a case, and it is believed such an one cannot be produced. The case is very far from being an ordinary case of contribution. If suit at law would not have been entirely defeated by showing that the plaintiff was principal in the new bond, and the defendant his surety, and that the plaintiff had admitted the receipt of the whole sum, yet clearly, the defendant could, under the circumstances of this case, have restrained the plaintiff from enforcing the payment of the one-half of the gross amount, until it was ascertained in a due course of administration, how much *Snyder's* estate would pay, and of course how much the ultimate loss would be, especially, as in the meantime no actual advance of the capital was required, and no actual loss sustained by the plaintiff.

It is a case now complicated by sundry payments and receipts running over quite a long period of time, and in adjusting which, accounts between the parties will be necessary to ascertain the true merits of their respective claims, if indeed the complainant shall ultimately be found to have a claim.

It is therefore the proper subject for a bill in Chancery, where the technical objection of the admission in the account passed by the complainant will not conclude him, and where a

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thorough examination of all the accounts can be had, and an opportunity afforded of proving the agreement, and remedy extended to suit all the circumstances of the case. It has been intimated that perhaps in equity, no claim for contribution could have been enforced at any period prior to the actual payment of the money by the appellee, the guardian. In that view of the case, there would be no pretence to allege that the claim was stale, but upon the ground even that a proceeding could have been instituted as soon as the appellee charged himself with the debt, yet the period has not elapsed which is considered as evidence of payment. That period has been fixed at twenty years, and ought not to be shortened, except under peculiar circumstances; whereas in this case, there are peculiar circumstances to account for the delay, and of course to forbid the making the exception.

The case being before us on bill and answer, on motion to dissolve the injunction, must in reference to that motion be regarded as if there was no such agreement between the parties at the time *Hull* became guardian; the answer of defendant, having positively denied its existence. It is not however denied that there was a balance due from *Snyder*, for which both were equally liable; that *Hull* charged himself with this amount, without in fact receiving it, and that *Snyder's* estate was partially insolvent. These facts alone, exclusive of any agreement, would entitle *Hull* to contribution, and therefore would make it inequitable for *Flickinger* to issue an execution for and recover the whole of the balance paid by him on the ward's judgment. The injunction therefore was properly continued to restrain him from such proceeding.

It is said that by the authority of 7 G. & J. 306, *Planters Bank & Hodges*, this court have required the injunction to go only for the amount claimed as a deduction, here the appellee claims "nearly the whole," the admission of a balance is in very equivocal terms, and a readiness is alleged to pay what may be found due. So far however as he admits a balance due to *Flickinger*, the court below should have passed an order directing the amount to be brought into court to be paid



accordingly, and doubtless would have done, and will still do so at any time on a petition by the appellants to that effect.

It is not in this case a sufficient ground on which to dissolve the injunction. The answer sets up various matters by way of defence, but they are not responsive to the bill; and cannot of course affect the question of dissolution which is now before the court.

A question has been made in the argument on the conformity of the assignment stated in the proceedings to have been made by *Rachner and wife*, who were the beneficial plaintiffs in the judgment obtained against these parties on the guardian bond, to the provisions of the act of 1763, ch. 23, but the view taken of the case has rendered an opinion on that question unnecessary.

On the whole, this court is of opinion that the bill does contain matter fit for the jurisdiction of the court, and entitling the complainant to an injunction, and that the answer does not entitle the defendant below, the appellant here, to a dissolution of that injunction.

DECREE AFFIRMED.

MAGRUDER, J., dissented, and delivered the following opinion.

This appeal is from an order of *Carroll* county court, sitting as a court of equity, continuing an injunction which had been granted to the appellee. Ought that injunction to have been continued?

If one of the allegations to be found in the bill of complaint had been admitted in the answer; if it could appear to us, that there was an agreement between the complainant and the defendant in the bill, that the former should be the guardian of the ward spoken of in the proceedings, after the death of the first guardian, should charge himself in the Orphans court with the amount of the ward's estate, which was in the hands of the first guardian at the time of his death, and that any loss thereafter to be sustained by reason of the insolvency or waste of assets, of the first guardian's estate, should be equally borne by these parties, (the securities in the first guardian's bond,)

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the complainant's case in equity might have been a very different one, from that which in deciding this case we are bound to suppose it to be. Whatever cause others might find to complain of such an arrangement, and the settlements in consequence of it, yet *inter se*, in any controversy between those parties, and in which no other person had an interest, the settlements by the complainant in the Orphans court, would perhaps be no obstacle to the relief which is sought by him in this case.

This allegation is denied in the answer, and it may be proper to remark here, that before the argument in the court below, the complainant obtained a commission to take proof, as authorized by the act of 1835, ch. 380, sec. 8, "to be considered in connection with the bill or petition, and answers in the cause." Having thus been afforded an opportunity of sustaining his allegations by proof, and failed, we may well suppose that the matter alleged is incapable of proof. At all events, at this time and upon this appeal, we are bound to assume that it is utterly unfounded.

The case then may be stated in these words: In the year 1820, the Orphans court of *Frederick* county appointed one *Jacob Snyder* the guardian of *Matilda Flickinger*, at that time an infant. The complainant and defendant became his securities in the bond executed by him as guardian. This guardian took possession of his ward's estate, and was in the possession of it when he died in 1825. The complainant thereupon was appointed the guardian, and gave bond as such, with the defendant and another as his securities. In the following year (1826) the complainant as guardian, settled his first account with the Orphans court, and charged himself with the whole amount of the ward's estate, which was in the hands of the first guardian at the time of his death, and as being then in the hands of himself, the second guardian. Another bond was required from and given by this second guardian in 1831, and in that bond a different person, and the defendant in Chancery, became the securities. The ward became of age in or before 1835, and at different periods the complainant paid to her sums

of money, still leaving a balance due to her ; and the same year that she came of age, this guardian settled his *eighth*, being his final account, and therein stated the balance which he still admitted to be in his hands, due to his ward. Failing to pay to her this balance, thus ascertained to be due to her, a suit was instituted on the last bond for the use of the ward and her husband, against the complainant and defendant, and a judgment was obtained thereon in 1845, for the sum ascertained as before stated to be due to her, after deducting any payments made by the guardian subsequently to the last settlements. The amount due on the judgment the defendant has been compelled to pay, and having paid it, obtained an assignment thereof.

Complainant says, that he paid more money to the ward than the defendant in the court below, and insists that each is bound to pay one-half, because they were securities for the first guardian. He asks for an account, and that the defendant below shall be restrained by injunction from proceeding upon the judgment obtained on the bond in which the complainant was principal, and the defendant in the court below only his security.

It is manifest then that the complainant must insist that these payments, though made in satisfaction of the judgment, were not on account of the bond, whereon the judgment was obtained. He insists that the money was in truth still due from the estate of the first guardian, and for that ward's estate, (after crediting some payments made to himself by the representative of the first guardian,) the first bond in which complainant and defendant were co-securities, was alone answerable ; that the second bond, upon which the ward obtained a judgment, never was responsible.

This then is an attempt by the complainant to impeach a settlement made by himself in the year 1825, and verified at the time by his own affidavit, confirmed by him in seven later settlements voluntarily made by him, verified also by as many affidavits, when it is not and cannot be pretended by him, that any of these settlements was the result of fraud, surprise, mis-

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take, misapprehension, or ignorance, and this attempt is made upwards of twenty years after the first settlement. If this was every thing that could be said in opposition to this attempt to impeach these settlements, it surely would be quite sufficient in a court of equity, and indeed, every where. Of courts of equity it has been said, that in resisting and defeating stale demands, they sometimes act in analogy to the law; but they act too upon their own inherent doctrine of discouraging for the peace of society antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or unreasonable acquiescence and delay in the assertion of adverse rights. See 2nd *Story Eq.*, sec. 1520, and the various authorities to which reference is there given. If these settlements with the Orphans court, prepared by himself, and verified by his own affidavit, speak the truth, then there is no pretext for the relief which is sought. If such an allegation had been made at the time, or shortly after the first settlement, it is possible that the most conclusive proof could have been adduced that the complainant did actually receive of the representatives of the first guardian, the money with which he so often charged himself as being in his hands. Receipts might at the time have been obtained, and in the course of time lost. And why in this individual case, should they have been preserved? What motive would the representative of the first guardian have to retain for upwards of twenty years, receipts which would only prove that of which the party who gave the receipt had been so careful to furnish *record* evidence within the reach of all? How often has it been remarked, that courts of equity refuse relief to stale demands, even in cases where no statute of limitations could be pleaded? There is no statute of limitations to bar the recovery of a legacy; but if not claimed within twenty years, the payment of it will be presumed, and no account at such a distant period can be demanded in equity by a legatee or distributee. The length of time establishes the fact, of which, but for the lapse of time, there is no evidence. This however is not all. We are now required to believe, that for the estate of this ward, (except a



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portion of it,) the second bond was not answerable. Yet upon the second bond, a judgment has been obtained against the defendant as security for the complainant for the whole, when such judgment could not have been obtained, but for these false statements by the principal, and his concealment of what he now says is the truth, until his security had been compelled to pay the money, due, not upon the second, but upon the first bond. If the facts were so, then the defendant has been most shamefully defrauded, and by nobody but the complainant, of every indemnity which may have been given to him in order to induce him to become a security in the first bond. Yet more: if in equity it is decided, that the settlements are nullities, what is to become of the judgment, and the money that was received in satisfaction of it, from the defendant in the court below? Is the evidence to be demolished, when wanted by the security, and yet the judgment obtained against him upon that evidence (furnished by the principal) to remain untouched?

It may be confidently affirmed, that no attempt is ever successfully made in a court of equity, to correct an error wilfully made by the party, asking for the correction for his benefit exclusively, and when by the correction an innocent person is to be prejudiced. A man is not at such times as he pleases, to have the benefit of the truth, when others have been or may be injured by his wilful suppression of it. A man cannot be allowed to rely even on his own negligence for his own benefit. A concealment of title will sometimes operate a forfeiture of it, as was shown by the authorities cited in this court in the case of *Bowly & Lamott*, 6 H. & J. 500. But in the case before us, a conclusive answer to every thing in the bill of complaint (expunging that part of it which is expressly denied,) is *nemo suam turpitudinem allegans est audiendus*.

In deciding this case, it is not necessary to enquire, whether if these statements were false, the first bond was ever discharged. It may be that the ward ought to be allowed to have had a remedy on the first bond, though if a suit had been instituted upon that bond, it is difficult to conjecture how it could have been supported, if the settlements had been pro-

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duced in proof, that all which was in the hands of the first guardian had been paid over by his own acknowledgment, to the only person who was authorized to receive it. We are not enquiring what were the ward's rights, and as she has sued upon the second bond, recovered a judgment, and that judgment has been satisfied, it would be difficult for her now to claim any thing on the first bond. It is certain that the two bonds could not be liable to her at the same time for the whole estate.

Of course it is not designed to say now, that upon a final hearing, the complainant in this case will not be able to prove that he is entitled to relief. The question at this time is, whether upon this bill and answer, the injunction which has been issued ought to be dissolved? If the complainant should hereafter show he is entitled to any relief, a dissolution of the injunction at this time will not hinder him from obtaining it. At present, we must consider this as an attempt by him to prevent his security from recovering back money which he has been obliged to pay for him, under the pretext that he also has a claim against his own security, as co-security with him in a bond given by another person for the performance of duties which that person had undertaken. To maintain his right to relief, he must show not only the case alleged, but if the estate has not been paid over by the representatives of the former guardian, that no part of it has been lost by reason of any neglect of duty by him, the second guardian. The facts stated in the answer, if shown, will materially prejudice the complainant. "It is true," as *Story* observes, "that it is impracticable to limit the power and discretion of courts of equity, as to the particular cases in which injunctions shall be granted and withheld." It is true also that "the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse." Injunctions to stay the execution of judgments at law, ought not to be obtained with too much facility, yet unquestionably they are frequently granted most improvidently, and it seems to require but ordinary skill, so to frame a bill, as not only to obtain it, but to prevent its dissolution until final hearing, when oftentimes it is dismissed,

because there is not a particle of equity in the complainant's case. According to the answer, too, it would seem that the party practised a fraud upon the court, in suppressing facts, which, if disclosed, might have deprived him of all title to relief—that there has been *suppressio veri*, as well as *suggestio falsi*. It is true, those parts of the answer are not strictly responsive to the bill, but this is because of the omission by the complainant himself, if the defendant is to be believed, to disclose all the material circumstances of the case, because the bill itself does not expressly authorize the defendant to put the court in possession of some of these circumstances.

The act of 1836, ch. 380, certainly does change the rules by which our Court of Chancery had previously been governed in disposing of motions to dissolve injunctions. They are not now necessarily to be decided upon bill and answer; so it is in England, as it appears by the cases referred to, 1 *Swans*. 254, (note b.) In *Maryland*, these rules are not quite so inflexible as they are usually supposed to be. See 1st *Bland*, 137. An injunction ought not to be a mere contrivance for the hindrance and delay of justice. In bills for an injunction, *denials* are sometimes to be deemed as necessary as *averments*. In continuing, as well as in granting injunctions, it is to be remembered that the injunction power ought to be exercised with extreme caution, or it will be made an instrument of oppression and irreparable wrong. "There is," said *Justice Baldwin*, (*Baldwin's C. R.*, page 218,) "no power, the exercise of which is more delicate, which requires greater caution, deliberate and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. If it issues erroneously, an irreparable injury is (often) inflicted, for which there can be no redress, it being the act of the court, not of the party who prays for it."

Leaving then the complainant to his remedy, if upon a final hearing he can show that he is entitled to relief, it seems to

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be but justice, that the appellant should be left at liberty to issue an execution upon the judgment, (to which the complainant ought not now to be permitted to object,) to recover money which he has been compelled to pay, as security for the plaintiff, and which in that suit, he could not have been compelled to pay, but for the admitted, avowed misconduct of the complainant himself.

It may indeed be said, that as the complainant was security in the first guardian's bond, and responsible for the estate which came to the hands of the first guardian, he might be considered by operation of the law, in possession of the estate. This is not true. An executor, if appointed guardian of an infant distributee of the estate, after a final account has been or ought to have been passed, by operation of the law, is in possession of the estate thenceforward as guardian. *Watkins' Adm'r vs. The State, use of Shaw*, 2 G. & J. 220. There is however, a wide difference between an executor who is appointed a guardian, and a security of the first guardian. The case just referred to tells us that in the case of a joint executorship, if one of them is appointed guardian, the property cannot be considered in his hands until he actually receives it, because his co-executor is equally with himself entitled to the possession of the assets.

I am then of the opinion, that all the real equity in this case is denied by the answer, and the injunction ought to be dissolved.

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AMOS A. WILLIAMS vs. GEORGE H. WILLIAMS, TRUSTEE OF  
GEORGE WILLIAMS, AN INSOLVENT DEBTOR.—*June, 1847.*

An appeal will not lie from an order of the county court, made in proceedings under the act relating to insolvent debtors, refusing to associate another trustee with the permanent trustee of the insolvent, nor ordering a sale made by such trustee to be ratified and confirmed.

Creditors injured by the misconduct of the permanent trustee of an insolvent, have a remedy in the proper *forum*, and proper form, upon his bond for the discharge of his duty.



APPEAL from *Harford County Court*.

In the matter of *George Williams*, an insolvent debtor, upon the petition of the appellant, the county court (ARCHER, C. J.) on the 31st July, 1846, passed the following order:

For misbehavior by the trustee, the county court may remove him by the power conferred on it by the 10th sec. of act of 1805, ch. 110. But no power is conferred either directly or constructively to associate with a trustee another who is to participate with him in the discharge of the duties which he is bound by law to perform. The application of *A. A. Williams* and other creditors to associate *Mr. Yellott* with the present trustee, in the administration of the trust, cannot be gratified.

It does not appear from a careful reading of the testimony taken in this case, that any sufficient reason has been assigned for setting aside the sale of the stock of the insolvent in the *Savage Manufacturing Company*.

The sale was made in *Bel Air* in conformity with the order of the judge, which order was in conformity with such as are usually obtained by trustees, and the place of sale was not solicited by the trustee. It was advertised for the usual time and in the usual manner, and the sale, although not made on the most public day, yet was made where sales have been frequently made. Had the sale of the stock been ordered in *Baltimore*, or in the *Howard District* (where the company is situate,) there is nothing in the evidence which induces the court to believe that a higher price would have been obtained for the stock, than what it sold for in *Bel Air*.

The company had been long in operation, and in consequence of not making regular dividends, the stock had no fixed market price. Before the day of sale by the trustee, no sales for money had been made at a higher price than the trustee obtained, and although the stock may have been intrinsically worth more, as a marketable commodity, it certainly was not on the day of sale estimated higher in the market than the price obtained for it by the trustee.

Under such circumstances, the court thinks the purchaser was fairly entitled to be confirmed in his purchase.

That afterwards the stock rose in the market in consequence of the active exertions of certain stockholders to acquire an ascendancy in the government of the company, ought not in my apprehension to have any influence on the validity of the sale.

The court perceives nothing in the conduct of the trustee, or in the character and amount of the sale, which ought to disturb the title of the purchaser, or to order the stock again to be placed in the market.

Ordered the 26th May, 1846, that the sale heretofore made by *George H. Williams, trustee of George Williams*, be, and the same is hereby ratified and confirmed.

From that order *Amos A. Williams* prosecuted this appeal.

At this term the appellee, the trustee, moved to dismiss the appeal.

The motion was argued before CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By OTHO SCOTT and JOHN NELSON for the motion, and

By YELLOTT and R. JOHNSON contra.

MAGRUDER, J., delivered the opinion of this court.

The appeal in this case is taken from an order of *Harford* county court, dated 26th May, 1846, in the case of *George Williams*, an applicant for the benefit of the insolvent laws of this State. The application was made by the insolvent, in December, 1843.

In April, 1845, the trustee made report to *Harford* county court, of a sale made by him, of a part of the property of the insolvent. Why such report was made, does not appear; and there is no act of assembly which requires it. An order, however, was obtained on the 14th April, 1845, that the sale would be ratified unless cause to the contrary be shown, on or before the 17th day of May, (1845,) then next. On that day, the appellants filed objections to the sale. Afterwards, an ap-

plication was made in their behalf, and in behalf of other creditors, to the court, to associate *Coleman Yellott, Esq.*, as trustee, to act jointly with the trustee in the case. On the 31st July, 1846, *Harford* county court acted upon the objections to the sale, and the application for the appointment of another trustee. This application the county court refused to grant, and overruled the objections to the sale. In disposing of these objections, perhaps it was not necessary for the court to add that the sale be ratified and confirmed; but these words can give no right of appeal.

From this order of the county court, an appeal is taken, and this court is called upon to decide whether the parties can appeal from such an order.

It will hardly be pretended, that so much of the order as relates to the appointment of a second trustee can be reviewed in this court. If a doubt could ever have existed as to the right of appeal from such an order, the decision of the court in *1 Harris & Gill*, 160, ought to remove it. It is equally clear to the court, that from the rest of the order no appeal will lie.

It is true, indeed, that evil may sometimes result to individuals from the want of the right of appeal in such a case. But if so, relief must be sought elsewhere. No exceptions could be taken in the trial of issues, sent from the Orphans court, in the case of a contested will, or in the trial of issues from the county court upon allegations against an insolvent petitioner, until the legislature authorized the taking of them, and an appeal to the Court of Appeals. So our late bankrupt system allowed no appeal from the decisions of the *District Court*, in the exercise of the chancery powers with which it was invested; although these decisions often related to large amounts of property. The execution of such trusts, it was thought right, ought not to be delayed by appeals; of this, the creditors have no right to complain, because if injured by any misconduct of the trustee, the law has taken care that they shall have bond, with security, the condition of which obliges the trustee, in all things, well and truly to discharge and fulfil his duties as trustee; and if the trustee be charged with a neglect of duty,

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whereby the party so alleging can be shown to be injured in the trial of the issues, on such an allegation made in the proper form, and in the proper forum, the right of appeal from a decision by the inferior court may be claimed.

APPEAL DISMISSED.

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GEORGE H. WILLIAMS, TRUSTEE, vs. AMOS A. WILLIAMS.  
*June, 1847.*

The trustee of an insolvent debtor cannot appeal from an order of the county court, before which the application of the insolvent is depending, directing him to sell the right and title of the insolvent to certain stock mentioned in his schedule of effects.

Such an appeal is not authorized by any act of assembly; and it is not a case either at law, or in equity.

APPEAL from *Harford* County Court.

In the matter of the petition of *Amos A. Williams* and another, for an order of the court on *George H. Williams*, trustee of *George Williams*, an insolvent debtor, to sell certain stock of the insolvent.

On the 20th Nov'r, 1846, *George H. Williams*, the trustee in this case, was ordered and directed to proceed forthwith to make sale of all right, title, and interest at law, and in equity, of the said insolvent, in the thirty-five shares of stock in the *Savage Manufacturing Company*, returned upon the schedule of said insolvent as being mortgaged to *Martha Weld*; said sale to be made in the city of *Baltimore*, and free from all liens on said stock, created by said insolvent; and the trustee before proceeding to sell shall give notice, &c., and to report for ratification, &c.

From this order, the trustee appealed to this court; and at this term, the appellee moved to dismiss the appeal, upon the ground that it was unauthorized.

The motion to dismiss was argued before CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.



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By C. YELLOTT and R. JOHNSON for the motion, and

By OTHO SCOTT and JOHN NELSON contra.

MAGRUDER, J., delivered the opinion of this court.

It is insisted by the appellee, that from the order of *Harford* county court, which is the ground of this appeal, the party appealing has no right to appeal.

This presents the question now before us.

This is an appeal from an order, passed by *Harford* county court, in the case of *George Williams*, a petitioner for the benefit of the insolvent laws of this State. The application of the petitioner was made the 19th December, 1843, and was made to a justice of the Orphans court of *Harford* county. On the 12th April, 1845, the justice of the Orphans court, to whom the application was made, directed a sale of the property of the insolvent. But this order was not passed until long after the proceedings before him, upon the application of the insolvent, had been returned by him to the county court. And when by the condition of the bond taken by the justice, the trustee was required in all things to observe, obey, and perform the orders, judgments and directions of *Harford* county court in the premises. The insolvent obtained his final discharge, and the record informs us what proceedings were had in *Harford* county court before the 20th November, 1846. On that day, *Harford* county court passed an order that the trustee proceed forthwith to make sale of all right, title, and interest at law, and in equity, of said insolvent, in thirty-five shares of stock in *The Savage Manufacturing Company*, returned in the schedule of said insolvent as being mortgaged to *Martha Weld*, and prescribing the terms of sale. From this order the trustee appealed to this court.

A more particular notice of the proceedings in this case might be necessary, if the right of the appellant to appeal was established. But we are of the opinion, that from such an order, he had no right to appeal. No act of assembly authorizes it; and we must reverse the decision of this court in the case of the *Wilmington and Susquehanna Rail Road*

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Oldham *vs.* State, use of Crothers.—1847.

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*Co. against Condon*, (8 *G. & J.* 443,) before we can entertain this appeal. This is no case, either of law, or of equity. There can be no right of appeal in such a case as this—of course, this court is not authorized to express an opinion on the several points which have been discussed.

APPEAL DISMISSED.

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JAMES E. OLDHAM *vs.* THE STATE, USE OF MARY E.  
CROTHERS.—*June*, 1847. E. S.

The acts of 1781, ch. 13, and its supplements, are final in their character, and supersede the former laws punishing the offence of fornication.

The proceedings under those acts are treated by the law as criminal proceedings.

Under the act of 1796, ch. 34, the mother or other person maintaining the child, may obtain the fruits of the recognizance required to be taken in such cases. They are substituted for the county, but this does not at all change the character of the proceeding.

The father of an illegitimate child committed under a *ca. sa.*, for violation of his recognizance to maintain the child, cannot relieve himself by application under the insolvent laws.

Where the recognizance to indemnify the county for the support of an illegitimate child becomes insufficient by reason of the insolvency of the security, the county court may order the father to enter into a new recognizance, and no appeal lies from such an order.

APPEAL from Cecil County Court.

On the 16th October, 1843, the recognizance of the appellant and another, that he should indemnify the county from all charges that might arise for the maintenance of an illegitimate female child, born on the 27th June, 1842, was filed in said county court. On the application and affidavit of the mother, it appeared that she had maintained the child from the 27th June, 1842, to 27th June, 1843, at which time it was of the age of one year, and the court ordered the appellant to pay the sum of thirty dollars to the said *M. E. C.* Afterwards on the 13th March, 1844, a *feri facias* was issued against the appellant and

his surety to pay said sum, on which, judgment of *fiat* was entered upon their default to appear. On this a *fi. fa.* was sued out. This was countermanded, and a *ca. sa.* issued on the 25th October, 1844, on which the appellant was returned *cepi* and committed.

On the application and suggestion of the mother, that the recognizance was insufficient and admission that the security was insolvent; it also appeared that *J. E. O.*, on the 4th June, 1845, petitioned for relief under the insolvent laws. At April term, 1846, the county court being of opinion that the discharge of the insolvent would not affect the debt or fine claimed under the recognizance, granted him the usual discharge under the act of 1805.

The appellant then moved the county court to quash the *ca. sa.* under which he was committed, upon the ground that the judgment on which it was rendered, was rendered before his application aforesaid for relief.

The parties thereupon filed the following statement of facts.

In this case it is admitted that *Mary E. Crothers* of *Cecil* county, was on the 27th of June, 1842, delivered of an illegitimate child, of which *James E. Oldham* of said county was the father; that the said *J. E. O.* on the 14th day of October, 1843, entered into a recognizance to the State of *Maryland*, with *William M. Biddle* as his surety, for the support and maintenance of the said child, until it reached the age of seven years; that the said *Mary E. Crothers* has supported and maintained the said child, and that she obtained an order against the said *Oldham*, and *Biddle* his surety, for the payment of an adequate amount for the support of her child; that said *Oldham* and *Biddle* refused and neglected the payment of the said sum of money, and that a judgment was recovered in *Cecil* county court for the same, and that the same is still unpaid; that the said *Oldham* is at this time utterly insolvent, and a petitioner for the benefit of the insolvent laws, and that the said *Biddle* has left this state to reside elsewhere, and is a man of no property and is insolvent. That the said *Mary E. Crothers* moved the court at October term, 1845, of the said

court, for an order directing *James E. Oldham* to enter into a new and sufficient recognizance to the State of *Maryland* for the maintenance of her said illegitimate child.

On this statement of facts, the opinion of the court is prayed on the following questions: "Whether the personal discharge granted to *James E. Oldham*, releases him personally from the amount for which the said judgment was rendered.

Secondly. Whether this court has jurisdiction or authority to require another and sufficient recognizance to be entered into by the said *James E. Oldham*.

If the court shall be of opinion, that the personal discharge of *James E. Oldham*, releases him personally from the amount of said judgment, then the said court is to order the discharge of the said *Oldham*. If of a different opinion, then the court are to over-rule the motion of the said *Oldham* for his discharge.

If the court shall be of opinion, that they have authority to require another recognizance, then the court is to order said *Oldham* to give such additional recognizance. If the court shall be of a contrary opinion, then the motion before the court for a recognizance is to be overruled. It is agreed, that either party may appeal from the decision to the Court of Appeals.

The court passed the following order:

We are of opinion, that the personal discharge of *James E. Oldham* under the insolvent laws, will not release him from the payment of the amount due, under the recognizance, at the time of his personal discharge. And the court, on the second question, are of opinion, that it is competent for this court to order another recognizance to be entered into to secure the payment of the money intended to be secured by the former recognizance. The court, therefore, overrule the motion on the part of said *James E. Oldham*, which prayed for his discharge from imprisonment, and make absolute the rule to give another recognizance.

The appellant entered in another recognizance, and then appealed to this court.



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The cause was argued before ARCHER, C. J., DORSEY MAGRUDER and MARTIN, J.

By H. C. MACKALL for the appellants, and

By R. C. HOLLIDAY for the appellee.

ARCHER, C. J., delivered the opinion of this court.

The acts of 1781, ch. 13, and its supplements, we consider final in their character. They superseded former laws punishing the offence of fornication; and according to the very terms of the title to the law, direct “proceedings against persons guilty of fornication.”

By this law, the mother, unless she will disclose the father of her illegitimate child, is condemned to give security to indemnify the county from any charge which may accrue from the maintenance of such illegitimate child; and if she disclose the father, the like security must be given by him. On the refusal to furnish the security, or to disclose the father, the female is to stand committed, to be safely kept until she shall give such security. If the person charged with being the father, should think himself aggrieved by the judgment by which he is condemned to give the security, then recognizance is to be taken for his appearance at the county court where the same proceedings are to be had by indictment, as in other *criminal cases*; and if found *guilty*, then the court adjudge him to give security to indemnify the county; and if he neglect or refuse to comply, he is to *stand committed until he shall comply*.

The proceeding is treated by the law as a *criminal proceeding*; and it is classed by the law itself among *criminal cases*.

That the design of the law, in the punishment inflicted, was to indemnify the county, does not in the least change the character of the proceeding. The recognizance is to be given to *the State* to accomplish a purpose of public convenience, and the insolvent laws do not reach such a case.

Proceedings under the first law being dilatory to recover on the part of the county, indemnification, the supplement of 1796, ch. 34, was passed, which gave to the mother or other person

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maintaining the child, the right to obtain the fruits of this recognizance; and is a substitution of the mother or other person, at their election, in the place of the county, and does not at all change the character of the proceeding.

We therefore think the court were right in overruling the motion of *Oldham* to be discharged, and affirm their judgment in this respect.

We do not think that an appeal will lie from the opinion expressed by the court, that upon the facts stated they possessed the power to order another recognizance to be entered into, and the appeal, therefore, is in this respect dismissed.

JUDGMENT AFFIRMED.

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**ELIZA C. GARDINER vs. OSCAR MILES.**—*December, 1847.*

The defendant pleaded in bar to the plaintiff's declaration, and tendered an issue to the country. Several terms after, before the issue was made up, the defendant prayed leave to amend his plea, and plead anew, which was granted.

The defendant then pleaded three new pleas, viz: Nos. 2, 3 and 4. To the 1st and 3d pleas, the plaintiffs then joined issue, and demurred generally to the 2d and 4th. The county court sustained the demurrers, and overruled the 2nd and 4th pleas. This defendant again obtained leave to plead anew, and then pleaded two pleas; upon the *first* of which, the plaintiff joined issue, and demurred to the *second*. He again obtained leave, and pleaded his 3d, 4th and 5th pleas. The plaintiff demurred to the 3d and 4th of the last amended pleas, and joined issue upon the 5th. The county court rendered judgment upon the demurrers to the 2nd and 3d, and the 4th amended pleas for the defendant. Held, that the 2nd amended plea, which was demurred to, was not withdrawn or waived by the leave to amend, and filing the 3d and 4th amended pleas.

Filing additional pleas with the leave of the court, is not a withdrawal of prior pleas in the cause.

Where there are issues of fact, and several issues in law, and the county court renders a judgment generally upon the issues of law, it is to be presumed they acted upon all of them, and they will be so reviewed upon appeal.

Where the land of which a husband died seized, is sold by a court of equity for the payment of debts, by reason of the insufficiency of his personal estate to pay them, and his widow is a party to such proceeding; if the land is

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decreed to be sold free from the claim of dower, the widow would be barred of her right of dower so long as the decree remained unreversed.

A court of law will not decide, collaterally, whether the decree of a court of equity is correct. If a case is stated in the pleadings, which gives the court of equity jurisdiction, it is all that need be ascertained.

Ambiguity in pleading is the subject of special demurrer.

Where an action is brought by *A.*, and the defendant's plea in bar averred, that a person of the same name was a party to proceedings in equity, described in the plea, this is inferentially stating in the plea that it is the same person.

### APPEAL from *St. Mary's* County Court.

On the 1st January, 1844, the appellant, as the widow of *Charles Ll. Gardiner*, issued a summons in *dower* against the appellee, for one-third part of the freehold in the tract of land, called "*Part Brambly*," which was of her late husband, &c. To the plaintiff's declaration on such summons the defendant pleaded that the said *C. Llewellyn Gardiner*, late husband of the said *Eliza*, neither on the day he married the said *Eliza*, nor ever afterwards, was seized of the tenements aforesaid, with the appurtenances whereof, &c. of such an estate, as he could thereof endow the said *Eliza*; and of this, he puts himself upon the country.

The defendant at *August term*, 1845, prayed leave to amend his plea, which was granted; and he then pleaded:

1st. That the said *C. L. G.* had only an equitable interest in the tenements aforesaid, with the appurtenances. And that a large debt was due by the said *C. L. G.* to his brothers, the sons of *Thomas Gardiner*, to whom said real estate belonged; and which debt remained unpaid and unsatisfied; and this the said defendant is ready to verify.

2nd. That *Thomas Gardiner*, the father of *C. L. G.*, died seized and possessed of said real estate; leaving his three sons, *C. L. G.*, *Robert G.*, and *Thomas Gardiner*, his heirs-at-law. And the said *Thomas* and *Robert* had liens created by the laws of *Maryland* upon said real estate, to the amount of ten thousand dollars, at the death of the said *C. L. G.* And the said *C. L. G.* was not seized of such an interest in said real estate as he could thereof endow the said *Eliza*; and this he is ready to verify, &c.

3rd. That the said land, real estate and tenements descended from *Thomas Gardiner* to his three sons, *C. L. G.*, *R. G.* and *T. G.*, as his heirs-at-law; and that the said *C. L. G.*, by virtue of proceedings in *Saint Mary's* county court, for the division and valuation of said real estate, elected to take said real estate at the valuation thereof, and executed his bonds for the payment of the respective interest in said real estate of his two brothers, *Robert* and *Thomas*; and which bonds, to the amount of ten thousand dollars, remained unpaid and unsatisfied, at the death of the said *C. L. G.*; and the said *Eliza* is not entitled to dower in the same; and this he is ready to verify, &c.

*Eliza C. Gardiner*, as to the *first* and *third* pleas of the said *Oscar Miles*, joined issue with the defendant; and demurred generally to the *second* and *fourth* pleas, in which the defendant joined.

The court sustained the demurrers, and overruled the second and fourth pleas. Upon motion of the defendant, the judgment upon the demurrers was stricken out, and the defendant had leave to plead anew. He thereupon pleaded,

1st, that the said *C. L. G.*, late husband of the said demandant, neither on the day he married the said demandant, nor ever afterwards, was seized of the tenements aforesaid, with the appurtenances; whereof, he, the said *C. L. G.*, was seized of such an estate as he could thereof endow the said demandant; and of this he puts himself upon the country.

2nd. That the said *E. C. G.* ought not, &c., because he says that *T. G.*, the father of *C. L. G.*, died on 2nd April, 1826, seized and possessed of said real estate and tenements intestate, leaving three sons and a daughter as his heirs-at-law, to wit: *C. L.*, *T.*, and *Robert G.* That after the death of the said *T. G.*, *C. L. G.* filed his petition in *Saint Mary's* county court, for a commission of partition. That said commission was executed and returned, stating that said real estate had been divided into four lots. And that the said *C. L. G.*, being the eldest son, elected to take lot No. 1 of said real estate at its valuation, as by the record and proceedings still remaining in the said court,



more fully appears. And the said defendant says, that the said *C. L. G.* executed his bonds to pay to the other heirs their proportions of said lot No. 1, of said real estate; but died without paying or satisfying the same. And this defendant further says, that after the death of the said *C. L. G.*, *John J. Allstan*, the assignee of the said *T. and R. G.* filed his bill of complaint on the equity side of *Saint Mary's* county court, against *Richard H. Miles*, *Eliza C. Gardiner*, and the children and heirs-at-law of the said *C. L. G.*, for a sale of said real estate, to pay the sums so due and owing to the said *R. and T. G.*, for their proportion of the real estate of their father, *T. G.*; and such proceedings were had that *Saint Mary's* county court, sitting as a court of equity, at *August* term of said court, 1842, decreed a sale of said real estate, free, clear, and discharged of all right, claim, or title of any of the parties to said suit. And this defendant further says, that *Richard H. Miles* was appointed trustee to sell said real estate; and took upon himself the burthen of said trusteeship—and proceeded to sell said estate. And this defendant avers, that at the public sale of said real estate, he purchased the same for \$10,000, and complied with the terms of sale, by executing his bond, with security. And he avers, that the price given for said real estate was its full value, without incumbrance of any kind; all of which more fully appears by the record and proceedings still remaining in said court. And this defendant avers, that he has purchased said real estate, free, clear, and discharged of all the rights and interest of the said *E. C. G.* in said real estate; and this he is ready to verify. Wherefore, he prays judgment if the said *E. C. G.* ought to have her dower in said real estate as demanded.

The plaintiff joined upon the first amended plea, and demurred to the second, in which the defendant joined.

The defendant then by leave of the court, filed his *third*, *fourth* and *fifth* amended pleas, as follows:

3d. That *T. G.* the father of *C. L. G.* died intestate, and seized and possessed of said real estate, sometime during the year 1825, leaving *C. L. G.*, *T. G.*, and *R. G.* his legal repre-

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sentatives and heirs-at-law, and that the said *T.* and *R.* have not received their share or proportion of said real estate, and this he is ready to verify.

4th. That the said demandant is not entitled to have dower in said lands, tenements and real estate, because he says that after the death of said *C. L. G.*, said real estate was sold under a decree of *St. Mary's* county court, sitting as a court of equity, and the said defendant became the purchaser for a fair and full price, and this he is ready to verify.

5th. That the demandant is not entitled to dower in said real estate, lands and tenements, and of this he puts himself upon the country.

The plaintiff demurred to 1st and 2nd amended pleas, that is the 3d and 4th pleas in which the defendant joined.

The plaintiff joined issue upon the 3d amended (the 5th) plea.

The county court rendered judgment for the defendant on all the demurrers, and the plaintiff appealed.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MARTIN, J.

By THOMAS and CAUSIN for the appellants, and

By McMAHON for the appellee.

ARCHER, C. J., delivered the opinion of this court.

The court are satisfied that the first plea which was demurred to, is not to be considered as withdrawn, by the putting in of the subsequent pleas. If put in at the same time with the subsequent pleas, this would be clear. If put in subsequently by way of amendment, such amendment and filing of pleas cannot be considered either as a waiver of the first plea, or as a withdrawal of the pleas filed previously to the amendment.

To the first plea, issue was joined to the country. To the second, there was a demurrer, and joinder in demurrer—then the three successive pleas are each filed as additional pleas, each being filed with the leave of the court, showing thereby that the defendant did not design to withdraw his pleas already

filed, but that he still relied upon them. To the 3d and 4th pleas there are demurrers, and joinders in demurrer—and to the fifth plea there is an issue to the country—when the court pronounced their judgment, there were then three issues in law presented by the record for their consideration, and their judgment must be considered as pronounced upon all such issues; and the enquiry will then be, whether the court were right in the judgment pronounced by them in deciding the demurrers in favour of the defendant?

It is conceded by the counsel for the defendant, that the third and fourth pleas were bad on general demurrer. But it is insisted that the plea secondly pleaded on general demurrer, is good, and operates as a bar to the plaintiff's recovery, and of this opinion we are. The action is brought for dower in a tract of land, called "*Part Bramley*," and the plea after averring that the father of the husband of complainant died seized of *said real estate*, and that a partition of the same was had, whereby the same was divided into four parts, that lot No. 1 of said real estate was elected to be taken by the husband of the plaintiff, and that a bill was filed by the assignee of the bonds taken for the payment of the proportions of the other heirs, for a sale of the "*said real estate*," the plea then avers, that the said "*real estate*" was sold free and clear of the claims of all parties to the suit.

Now the enquiry is, what real estate is averred to have been sold? was it only part of the land in which dower was claimed, or was it the whole? The father of the husband it is averred, was seized of the real estate in which dower was claimed, and it is averred that *said real estate* was sold. This naturally refers to the whole land of which the father of the plaintiff's husband died seized. When it is said "*the said real estate was sold*," it cannot refer to *lot No. 1 of said real estate*, for that was only part of *the said real estate*, nor do the proceedings stated in the plea, lead to the certain conclusion that only part of the land was sold. It might be, that the husband of the plaintiff had acquired the title before the bill was filed to the whole of "*Part Bramley*," and his personal estate being insuffi-

cient to pay his debts, the whole real estate may have been decreed to have been sold to pay the claim of the complainant, in the bill stated in the plea to have been filed. If the whole land was decreed to have been sold to pay this debt, free from the claims of dower in the plaintiff, and she was a party, she would undoubtedly be barred of her right of dower, unless such decree should be reversed on appeal.

But if the plea in this respect be ambiguous, it ought on account of such ambiguity to have been the subject of a special demurrer. 23 *Eng. C. L.* 438.

Whether the Court of Chancery decided correctly or not on the case stated in the plea, is not for us to enquire. If a case is stated which gives jurisdiction to the court, it is all that need be ascertained, and such a case we think is there presented. Nor need we enquire into the existence of a lien in the assignee of the bonds.

It is certainly inferentially stated in the plea, that the plaintiff was a party to the bill in Chancery. A person of her name is a party.

It is stated that the land was decreed to be sold free from all claim of the parties, and that the defendant purchased the same free from the plaintiff's claim of dower.

*Eliza C. Gardiner*, the plaintiff, is therefore to be considered a party, and a decree which directs a sale free from all claims she might have in the land, would bar her claim of dower.

The court were, we think in error, in ruling the demurrer bad to the third and fourth pleas, but right in their judgment in relation to the demurrer on the second plea. And as that is conclusive against the plaintiff's right of recovery, we think the judgment entered for the defendant should be affirmed.

JUDGMENT AFFIRMED.



**BENNET GOUGH vs. ANN EDELEN.—December, 1847.**

There may be a perfectly valid transfer of personal property, both at common law, and under the 17th sec. of the statute of frauds, without either an actual delivery of possession, or a bill of sale.

The act of 1729, ch. 8, was intended for the protection of creditors, and has no application to a sale of personal property *inter partes*.

Although a sale of personal property, of which the vendor retains possession, is void as far as the rights of creditors are concerned, unless there is a bill of sale acknowledged and recorded in the mode prescribed by that act—still it is effectual against the vendor, and all claiming under him.

Where the agent of the plaintiff called on the defendant for the purpose of demanding a slave, the defendant stated she had sold the slave to the plaintiff, but that she ought not to have done so without the assent of her children, and refused to deliver the property, which had always remained in her possession from the time of such alleged sale, the defendant cannot require the court to instruct the jury, that unless they believe there was a sale made valid by delivery, or by bill of sale, duly acknowledged and recorded, the evidence was not sufficient to warrant the jury in finding a sale.

**APPEAL from St. Mary's County Court.**

This was an action of trover, brought by the appellant against the appellee, on the 19th February, 1845. The defendant pleaded *non cul*.

The plaintiff to support the issue on his part joined, proved by *Benj. G. Harris*, a legal and competent witness, that as agent for the plaintiff, he called on the defendant, for the purpose of making a demand for the delivery of the property mentioned in the declaration. That the defendant stated, that she had sold the property to the plaintiff, but that she ought not to have done so without consulting and obtaining the assent of her children to the sale. The plaintiff also proved by the same witness, that on the demand being made by him as agent for plaintiff, the defendant refused to deliver the property. The defendant then proved that she had always remained in the possession of said property from the time of said alleged sale.

The defendant then prayed the court to instruct the jury, that unless they believe from the evidence, there was a sale to the plaintiff by defendant, made valid by delivery of the prop-

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Gough vs. Edelen.—1847.

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erty, or by bill of sale, duly acknowledged and recorded, the plaintiff could not recover, and the evidence detailed above was not sufficient to warrant said finding—which instruction the court gave to the jury. The plaintiff excepted, and prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY and MARTIN, J.

By ALEXANDER for the appellant, and

By CAUSIN and MAYER for the appellee.

MARTIN, J., delivered the opinion of this court.

This was an action of trover, to recover the value of the property mentioned in the declaration; and alleged to have been sold by the appellee to the appellant. Not guilty was pleaded; and the plaintiff proved by a competent witness, that the witness, as the agent of the plaintiff, called on the defendant for the purpose of demanding a delivery of the property in question. That the defendant stated, that she had sold the property to the plaintiff, but that she ought not to have done so without consulting and obtaining the consent of her children to the sale. That the demand being made, the defendant refused to deliver the property.

The defendant then proved, that she had remained in possession of the property from the time of the sale, and prayed the court to instruct the jury, that unless they found that there was a sale to the plaintiff by the defendant, made valid by delivery of possession, or by bill of sale, duly acknowledged and recorded, the plaintiff could not recover; and that the evidence was not sufficient to warrant such finding.

This prayer was granted, and by giving the instruction as thus prayed, the court below announced to the jury, as the law of the case, that there could be no valid sale of the property in controversy, even as between the vendor and vendee, unless the sale was accompanied by delivery of possession, or evidenced by a bill of sale, acknowledged and recorded.

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Edelen vs. Gough.—1847.

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It is a familiar principle, and was not controverted by the counsel for the appellee, that there may be a perfectly valid transfer of personal property, both at common law, and under the seventeenth section of the statute of frauds, without either an actual delivery of possession, or a bill of sale; and we cannot understand the ground upon which this instruction was given by the county court to the jury, except on the supposition, that they considered the case before them, as embraced by the act of assembly of 1729, ch. 8.

But that statute was intended for the protection of creditors, and has no application to a sale of personal property, *inter partes*. By the sixth section, it is expressly declared, "that the act shall not be construed to make void such sale against the seller, his executors, administrators, or assigns, or any claiming under him;" and in the interpretation of this statute, it has always been held, that although a sale of personal property, of which the vendee retains possession, is void, as far as the rights of creditors are concerned, unless there is a bill of sale, acknowledged and recorded in the mode prescribed by the act, it is effectual against the vendor, and all claiming under him.

We think the court below erred in the instruction given by them to the jury; and that their judgment must be reversed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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ANN EDELEN vs. BENNETT GOUGH.—December, 1847.

By the plea of *non est factum*, the plaintiff is required to prove the signing, sealing and delivery of the instrument to which the plea is interposed; those three facts constitute the affirmative of the issue.

Whether the person appearing to be the attesting witness did subscribe his name to the instrument forms no part of that issue.

Before the act of 1825, ch. 120, the law for the benefit of the defendant, required the plaintiff to prove such issue by the testimony of the subscribing witness, or account for his absence, but be the testimony of the witness what it might, the parties were then at liberty to advance any other competent proof—tending to the establishment of the issue on their respective parts.

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Edelen vs. Gough.—1847.

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Where the attesting witness to an instrument proved that *E.* took her seat at the table—that he did not see her write her name—that he did not know, whether at the time of signing his name as witness, she had signed her name—that he could not say it was her hand-writing—that the instrument was not to his knowledge ever read to, or by her, this is not *prima facie* evidence of the signing, sealing and delivery of such instrument.

In an action upon a sealed note, which recited “on a settlement this day of *H*’s two notes, due *B.*, amounting to, &c., I fall in his debt.” Under the plea of *non est factum*, the defendant cannot give evidence of the administrator’s account of *H*’s estate, showing a settlement and over-payment of his debts before the date of the sealed note. Such evidence is irrelevant to the issue, and tended to mislead the jury.

A seal to an instrument *per se*, imports a consideration.

The statute of frauds on the subject of consideration, in agreements to pay the debts of third parties, has no application to instruments under seal.

The terms for value received in a written instrument, is a sufficient expression of a consideration required by the statute of frauds.

A note given to secure the anterior indebtedness of the defendant to the plaintiff, does not require words of consideration to support it.

### APPEAL from *St. Mary’s* County Court.

This was an action of *debt* brought by the appellant against the appellee, on the 19th February, 1845, upon her single bill of \$ 406 46. The defendant pleaded *non est factum*, upon which issue was joined. The jury found a verdict for the plaintiff.

1ST EXCEPTION. In the trial of this case, the plaintiff to support the issue on his part joined, offered to prove by a competent witness, *John Gough*, whose name is signed as witness to the cause of action, viz:

“On a settlement this day, of *Henry A. Edelen*’s two notes, due *B. Gough*, (amounting to \$ 1038 46), I fall in his debt the sum of four hundred and six dollars and forty-six cents; which sum I hereby promise and oblige myself, my heirs, executors or administrators, to pay to *B. Gough*, or order, for value received. Witness my hand and seal, this 4th day of March, 1844.

*Ann Edelen.* [Seal.]

Witness, *John S. Gough*.

The execution of the said writing obligatory, upon examination, the witness stated that *Ann Edelen*, the defendant, took her seat at the table; that he did not see her write her name;



he did not know whether at the time of signing his name as witness, the said *Ann Edelen* had signed her name; that he could not say that the signature to the paper was in the handwriting of said *Ann Edelen*; that the said paper was not to his knowledge ever read over to said *Ann Edelen*, or read by her. No other proof of the execution of the paper was offered upon part of plaintiff.

Upon the evidence so given, the defendant prayed the court to instruct the jury that the plaintiff was not entitled to recover; but the court (MAGRUDER, C. J.,) refused to give such instructions, but admitted the instrument to go to the jury. The defendant excepted.

2ND EXCEPTION. In the further trial of this case, the defendant to support the issue upon her part joined, offered to read in evidence to the jury the record of the administration accounts of *Henry A. Edelen*, showing a settlement and overpayment of the debts before the date of said writing obligatory in this case; having first proven that he was the same person spoken of in the writing obligatory, and that he was not related to said defendant in blood, or connected with her in estate, as a circumstance to be weighed by the jury upon the issues in the case; but the court refused to permit the said record to be read in evidence. The defendant excepted.

3D EXCEPTION. Upon the testimony on the *first bill of exceptions*, the defendant prayed the court to instruct the jury that the plaintiff was not entitled to recover, because there was no sufficient evidence of a delivery of the said writing obligatory by the said defendant, as her act and deed; but the court overruled the objection, and left the same to the jury. The defendant excepted.

4TH EXCEPTION. In the further trial of their case, the defendant upon the evidence offered in the foregoing three bills of exceptions, made parts of this, prayed the court to instruct the jury that the plaintiff was not entitled to recover, because there was no sufficient consideration expressed on the face of the cause of action, to supply the requirements of the statute of frauds, as relates to a promise to pay the debt of another; but

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Edelen vs. Gough.—1847.

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the court refused the instruction; because if proof of any consideration had been necessary, the words "value received" in the writing obligatory, imported a sufficient consideration. The defendant excepted.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MARTIN, J.

By CAUSIN and MAYER for the appellant, and

By ALEXANDER for the appellee.

DORSEY, J., delivered the opinion of this court.

By the plea of *non est factum*, the plaintiff is required to prove the signing, sealing, and delivery of the instrument to which the plea is interposed. These three facts constitute the affirmative of the issue, and are to be proved by the plaintiff to entitle him to a recovery. Whether the person appearing to be the attesting witness, did subscribe his name to the instrument, in the case before us, forms no part of the issue to be tried by the jury. It is true, that for the benefit of the defendant, and not of the plaintiff, the law, prior to the passage of the act 1825, ch. 120, required the latter to sustain the issue on her part, by the testimony of the subscribing witness, if in her power to obtain it, and preliminary to all other proofs. Let the testimony of the witness be what it might, the parties were then at liberty to adduce any other competent evidence, tending to the establishment of the issue, on their respective parts.

The greater portion of the argument in this cause, and of the authorities referred to, apply to the case where the plaintiff is unable to produce the testimony of the subscribing witness, by reason of his death, absence, interest, or other disqualification. On this part of the argument, and the adjudications referred to in connection with it, no opinion is designed to be expressed; no such question arising in the case before us. Here the subscribing witness was produced on the trial; and on his testimony only, did the plaintiff rely to prove the signing, sealing, and delivery of the instrument in

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issue before the jury. The defendant having prayed the court to instruct the jury, that upon the evidence so given, the plaintiff was not entitled to recover. The court refused to give such instruction; “but admitted the instrument to go to the jury, to which the defendant excepted.”

The only question brought up by appeal, under this prayer, in the bill of exceptions, is, was the testimony given legally sufficient to have warranted the jury in finding that the defendant did sign, seal, and deliver the instrument thus admitted by the court in evidence before them. To judge of such sufficiency, the testimony of the witness must be examined; which is as follows: “that *Ann Edelen*, the defendant, took her seat at the table—that he did not see her write her name—he did not know whether at the time of his signing his name as witness, the said *Ann Edelen* had signed her name—that he could not say that the signature to the paper was in the hand-writing of said *Ann Edelen*—that the said paper was not, to his knowledge, ever read over to said *Ann Edelen*, or read by her.” It has not been, and surely could not be, contended, that standing alone, the proof of his hand-writing by the subscribing witness, was *prima facie* evidence, or evidence of any weight upon the issue, as to the signing, sealing, and delivery of the bill in question. It was entitled to no consideration, except when taken in connection with other proof in the cause. It then only operates as a corroborating circumstance, showing the superiority of the means of knowledge possessed by the witness. But what is the nature of the other proof then to be corroborated. It is of such a character as neither to impart or receive strength from the attestation; but its obvious tendency is to cast discredit upon it. From the date of the instrument, to the examination of the witness, but two years and ten days had elapsed. No pretence on his part, that his knowledge of the transaction was not as full and as accurate as on the day of its occurrence. What under such circumstances ought to have been expected from him. Why that he would have proved every thing that in his character of attesting witness, it was incumbent on him to have known. He should have proved

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that he subscribed the instrument as a witness, in her presence, or at her request; or at least, that she signed her name to it in his presence, or acknowledged it to be her signature. For aught that appears in his testimony, he may have signed his name to it without her knowledge or consent, and out of her presence; and she may never have read it, or heard of it, or seen it, or had any knowledge of its concoction or existence, till after the institution of this suit. Such proof, instead of being *prima facie* evidence of the signing, sealing, and delivery of the instrument, is negatively *prima facie* evidence that it never had any legal existence. The court below therefore erred in permitting it to go to the jury.

There is no error in the refusal of the county court to admit to the jury the evidence offered by the defendant in his second bill of exceptions. It was, in its nature, so remote and irrelevant to the matters in issue in the cause, that its effect would most probably have been to bewilder and mislead the jury; and would have opened a door by which the jury might have been involved in the trial of a complication of issues—the finding of which would have had no bearing on the questions which the jury were sworn to try.

The court below erred in refusing the prayer of the defendant in the third bill of exceptions; for the reasons herein before stated, in reference to the first bill of exceptions.

There is no error imputable to the county court, in its refusal to grant the prayer of the defendant in the fourth bill of exceptions; “that the plaintiff was not entitled to recover, because there was no sufficient consideration expressed on the face of the cause of action, to supply the requirements of the statute of frauds, as relates to a promise to pay the debt of another.” The seal to the instrument, on which the suit was instituted *per se*, imported a consideration; and the expression of no other consideration was requisite: the statute of frauds, on this subject, not embracing or having application to instruments under seal. But were it otherwise, the court were still right, because the terms, “for value received,” was a sufficient expression of a consideration required by the statute. See



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*Douglass vs. Howland*, 24 *Wendell*, 35; and *Busk vs. Stevens & Kendle*, 24 *Wendell*, 256. The refusal of the court was justified on another ground. The instrument, on which the suit was instituted, was not given as a promise or agreement to pay the debt of another; but to secure payment of the defendant's anterior indebtedness to the plaintiff. The amount of this indebtedness was ascertained by her settlement of two notes of *Henry A. Edelen* to *B. Gough*. But whether she was a surety in said notes, or how she became answerable for the payment thereof, does not appear. Having, however, acknowledged herself so indebted, the instrument before us was given to secure the payment of her own debt, not the debt of another person.

There is no error of the county court disclosed in the *second* and *fourth* bills of exceptions; but for its errors in the *first* and *third* bills of exceptions, its judgment should be reversed, and a procedendo awarded.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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BALY L. CLARK vs. ROBERT DIGGES.—*December, 1847.*

The defendant, in a *scire facias*, by the plea of *nul tiel record*, may avail himself of the fact, that the judgment on which the *sci. fa.* is founded, was interlocutory.

Where a *scire facias* is not defective on its face, but states a good judgment, the motion to quash will not avail a party who desires to show, that by the error of the clerk, an interlocutory had been treated as a final judgment.

A "judgment," entered on the docket, "for \$12,000, penalty and costs: to be released on the payment of ——" is not interlocutory. It indicates a judgment, by confession, for the penalty; to be released upon the payment of such sum as might thereafter be agreed upon; and that it is not a binding judgment, until the sum shall be ascertained, as originally contemplated.

In determining the character of a judgment, this court can only look to it as extended by the clerk of the county court; whether it has been properly extended by the clerk, cannot be enquired into by this court collaterally.

Motions for the amendment of an original judgment, made upon the return of *scire facias* to revive it, are necessarily to be made in the original cause; and

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can only be acted upon, on appeal taken in that cause. If made in the *scire facias* cause, they will be overruled.

Under the act of 1830, ch. 165, the person for whose use a judgment has been entered, may prosecute a writ of *scire facias* to revive it in his own name.

The term "equitable assignee," in that act, is sufficiently comprehensive to include the *cestui que use*.

#### APPEAL from Charles County Court.

On the 16th August, 1843, the appellant sued out a writ of *scire facias*, as follows, viz :

"CHARLES COUNTY, TO WIT: *The State of Maryland to the Sheriff of Charles County, greeting:* Whereas, at a county court begun and held at *Port Tobacco*, in and for *Charles* county aforesaid, on the third Monday in August, in the year of our Lord one thousand eight hundred and thirty-two, a certain *Abraham Clark*, by the judgment of the same court, recovered against a certain *Robert Digges*, late of *Charles* county, yeoman, as well the sum of twelve thousand dollars, penalty, as the sum of six dollars and eighty-seven and one-third cents, for his costs and charges by him about his suit in that behalf laid out and expended; whereof the said *Robert Digges* was convict, as it plainly appears of record. And whereas, the said *Abraham Clark*, before the rendition of said judgment, assigned the                    to a certain *Baly L. Clark*, and that the said *Abraham Clark* is since deceased, to wit: at the county aforesaid, as it is said, and that no administration has been granted upon his estate; and that although the said judgment was so given, yet execution thereof still remains to be made; wherefore, the said *Baly L. Clark*, assignee as aforesaid, to whom the execution of and upon the said judgment ought to be made, and now of right belongs, hath besought that a proper remedy in this behalf be granted; and as it is right and just, that those things which are lawfully transacted and adjudged, should be carried into due and speedy execution; Therefore, you are hereby commanded, that by good and lawful men of your bailiwick, you give notice to the said *Robert Digges*, that he be and appear before the judges of the next court, to be held at *Port Tobacco*, in and for *Charles*

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county aforesaid, on the third Monday in *August*, instant, to shew, if he have, or can say any thing for himself, why the said *Baly L. Clark* ought not to have his execution against him, for the penalty, costs, and charges aforesaid, according to the force, form, and effect of the recovery aforesaid, if the said *Robert Digges* shall think fit, &c.

This writ was returned *nihil*, and renewed to March term, 1844, at which term the appellee appeared to said writ, and laid a rule on the defendant to answer. The defendant prayed leave to imparle until the next term, which was granted to him.

At August term, 1844, he craved oyer of the writ, which being granted, he demurred specially thereto, and assigned for causes of demurrer :

1st. That it shews and sets forth a judgment in the name of *Abraham Clark*, deceased, against this defendant ; and the said writ should be in the name of the administrator or executor of said *Abraham*.

2nd. That no sufficient assignment of said judgment, to the said *Baly L. Clark*, is therein shewn.

3d. That it is uncertain, on the face of said writ of *scire facias*, what was assigned before the rendition of said judgment, to said *Baly L. Clark*.

4th. That a blank is left in said writ of *scire facias*, by reason of which blank, the same is unmeaning and unintelligible.

5th. And also, that the said writ of *scire facias* is in other respects uncertain, informal and insufficient, and so forth.

The plaintiff was then laid under rule to join in the demurrer, and the cause was continued.

At March term, 1845, the defendant was laid under a rule security for costs, and the cause again continued.

At August term, 1845, the defendant complied with the rule security for costs ; and the plaintiff moved the court, that the special demurrer be not received, but stricken out, which was granted by the court. The defendant then demurred generally to the writ, when the plaintiff moved to amend it, viz :

“ Motion to amend the *sci. fa.*, so as to recite the judgment,

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according to the original entries, and to make the clause of *sci. fa.* conform to the plaintiff's remedy under the judgment."

Appended to said written motion are the following terms upon which said motion is granted by the court: (C. DORSEY, A. J.)

"The motion is granted, except to change the prayer in the *scire facias* for execution, and to substitute therefor a prayer for any other relief."

At March term, 1846, the plaintiff, in pursuance of the leave of the court heretofore given to amend the said writ of *scire facias*, files in court here the following titling for an amendment of the said writ of *scire facias* issued in this cause, to wit:

BALY L. CLARK vs. ROBERT DIGGES.      *Amended sci. fa.*

CHARLES COUNTY, to wit: *The State of Maryland to the Sheriff of Charles county, greeting:* whereas, at a county court begun and held at *Port Tobacco*, in and for *Charles* county aforesaid, on the third Monday of August, in the year of our Lord one thousand eight hundred and thirty-two, a certain *Abraham Clark*, for the use of a certain *Baly L. Clark*, by the judgment of the said court, recovered against a certain *Robert Digges*, late of *Charles* county, yeoman, as well the sum of twelve thousand dollars debt, as the sum of twelve thousand dollars damages, and six dollars eighty-seven and one-third cents for his costs and charges by him about his suit, in that behalf laid out and expended, whereof the said *Robert Digges* is convict, as it appears of record. And whereas, the said *Abraham Clark*, since the rendition of said judgment, hath departed this life, to wit: at the county aforesaid, as it is said; and although the said judgment was so given, yet it hath been understood in the said court that execution thereof still remains to be made; wherefore the said *Baly L. Clark*, to whom the execution of and upon the said judgment ought to be made, and now of right belongs, hath besought that a proper remedy be granted unto him in this behalf; and as it is right and just that those things which are lawfully transacted and adjudged, should be carried into due and speedy execution, therefore, you are



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hereby commanded, that by good and lawful men of your bailiwick, you give notice to the said *Robert Digges*, that he be and appear before the judges of the next county court, to be held at *Port Tobacco*, in and for *Charles* county aforesaid, on the third Monday in March next, to shew, if he have, or can say any thing for himself, why the said *Baly L. Clark* ought not to have his execution against him for the debt, damages, costs, and charges aforesaid, according to the force, form, and effect of the recovery aforesaid, if he, the said *Robert Digges*, shall think fit; and further, to do, &c.

On the back of the foregoing titling was thus written, to wit: "The clerk of *Charles* county court will file this titling, and amend *scire facias* accordingly. THOS. F. BOWIE, for Plffs."

In conformity with said titling and direction the said clerk did amend said writ of *scire facias*, &c.

The defendant moved the court, that the writ of *scire facias* in this cause may be quashed and set aside, and assigns in writing here the following reasons, to wit:

1st. Because the same prays for execution, as if it were issued to revive and enforce a final judgment; whereas, the said defendant offers himself here ready to prove, by the original judgment, and the bond filed among the proceedings anterior to the same, that said judgment was interlocutory, the cause of action on which said judgment was obtained being a bond with collateral condition. And, as part of this motion, the defendant herewith files the original papers, the writ, declaration, bond filed, and the docket entries in said original cause, now of record in this court, to wit:

The writ was in debt for \$12,000, issued 1st March, 1832, *Abraham Clark* against *Robert Digges*, to which the declaration conformed; but there was no assignment of breaches. The bond of *William D. Digges*, *William Brent*, and *Robert Digges* for \$12,000, was dated 5th Nov., 1825, reciting that *W. D. D.* was about to sue out an injunction, and with condition, that if the above bound *William D. Digges* shall well and truly observe, perform and fulfil all and every decree or decrees, order or orders, which the county court, as a court of Chan-

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cery, shall make and pass in the premises, then this bond to be void and of none effect, otherwise, &c.

“Sureties approved—Edmund Key—5th November, 1825.”

AQUILA BEALL, *Cl'k of P. George's county court.*

## DOCKET ENTRIES.

ABRAHAM CLARK, use of	} Debt, 1 capias, rule nar.—nar. and bond filed, rule plea—judg- ment for \$12,000, penalty and costs. To be released on the payment of—
BALY L. CLARK,	
vs.	
ROBERT DIGGES.	

Attorney's fee, . . . . .	\$3 33½
Sheriff's fee, . . . . .	45
Clerk's fee, . . . . .	2 59
Tax, . . . . .	50

Signed 22nd August.

\$6 87½

2nd. Because no right is shewn in said *Baly L. Clark* to issue *scire facias* in his own name.

The plaintiff then filed the following motion and affidavit, original docket entries before extension, and the 27th rule of court, to wit:

The plaintiff moves the court here, preliminary to the trial of this cause, to direct the clerk of this court to correct his misprision and mistake in extending the *original judgment*, on which the *scire facias* issued in this cause, by making the same to correspond with the facts and law, growing out of the pleadings in the original action, and the judgment as rendered by the court, and assigns the following reasons:

1st. Because the original judgment, as appears judicially by the pleadings in the record of said action, was rendered upon an absolute bond for the payment of a certain sum of \$12,000, and the declaration, on which said judgment was rendered, does not disclose the cause of action to be a bond with a collateral condition.

2nd. Because the defendant, not having craved *oyer of the bond*, filed with the plaintiff's declaration, the said bond is not a part of the record in said original writ, and cannot judicially

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be pronounced by the court to be a bond with collateral condition.

3rd. Because the clerk has made a mistake in extending the original judgment, by making it to appear that it is a judgment on a bond with a collateral condition, when the pleadings in the cause do not warrant any such inference or action of the clerk.

4th. Because the said original judgment ought to have been extended in point of fact as the law required it to be done, and not having been so extended, it is misprision in the clerk, and ought now to be corrected.

5th. Because under the 27th rule of court, herewith filed, the said judgment was not a judgment by default under the rule, but a confessed judgment, and absolute in its terms.

Personally appears, in open court, on this 28th day of August, A. D. 1845, *William B. Stone*, and makes oath upon the Holy Evangely of Almighty God, that he, as attorney for the plaintiff, prior to the issuing the *scire facias* in the above case, and a short time before August court, 1843, gave directions to *Mr. McCormick* then the acting deputy clerk in the clerk's office of this county, to make up the judgment in the above case in a proper manner, and issue *sci. fa.* to revive said judgment. That at the time said directions were given, the docket entries were particularly examined, and were "debt, 1 cap's, rule nar.—nar. and bond filed, rule plea, judg't," and no other entries, so far as recollected. That the other entries, now appearing upon said docket, in said case, were added after said instructions were given. That the said case was particularly pointed out to *Mr. McCormick*, and the instructions to the best of this respondent's recollection, were given in writing, with the titling in the above case.

Sworn to, this 28th day of August, 1845.

W. MITCHELL, *Clerk*.

The beneficial plaintiff in this action, moves the court to correct the mistake of the clerk in extending the judgment in this cause, and to direct the same to be extended *nunc pro tunc*, for the following reasons:

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1st. Because the judgment was rendered by confession, generally, to the declaration filed in the cause, and the declaration setting forth a good and substantial cause of action upon a bond for the payment of a sum certain, the judgment ought to have been extended for the sum of money and damages set forth and claimed in the declaration, and the costs of suit. The damages to be released on the payment of the debt and costs.

2nd. Because there was no agreement, or no other paper or proceeding in the cause which would authorize the conduct of the clerk in extending the judgment in the form in which it now stands. The original judgment having been entered simply "judgment."

3rd. Because for other reasons apparent upon the record in this case.

*27th Rule.* The rule day for filing declarations, and all pleadings, bills and answers, shall be the third Monday of February, and the third Monday of July, respectively, unless otherwise particularly directed by the court, and except in case of executors or administrators, which shall be on the second day of each term, after the rule is laid.

The defendant filed the following affidavit, to wit:

Personally appears, in *Charles* county court, this 26th day of March, 1846, *James McCormick*, and makes oath on the Holy Evangely of Almighty God, that while he was a deputy clerk in the clerk's office of said county, *William B. Stone*, Esq., an attorney of said court, some time in the year 1843, came to the said office, and requested this deponent to shew him the judgment of *Abraham Clark use of Baly L. Clark vs. Robert Digges*, of August term, 1832, the docket entries of which then stood, "debt, 1 capias, nar. and bond filed, rule plea, judgment,"—and were shown to said *William B. Stone*, by this deponent, when said *Stone* requested this deponent to extend the said judgment; that upon examining the papers, deponent felt doubtful how the judgment should be made up or extended, and to remove that doubt, deponent applied to the chief clerk in the office, *John Matthews*, Esq., who in-



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structed this deponent to extend the said judgment, by adding after the word judgment, “for \$12,000, penalty and costs. To be released on the payment of——.” That shortly after said judgment was so extended, *William B. Stone*, attorney for the plaintiff, directed this deponent to issue a *scire facias* to revive said judgment, as extended; and the *scire facias* was accordingly prepared by this deponent from a memorandum left with him by *Major Stone*, (which memorandum has been lost;) and before said *scire facias* was placed in the hands of the sheriff, said *Stone* examined the same, and approved of it; which said writ of *scire facias* is in the hand-writing of this deponent, and was returnable to August term, 1843, of this court. Deponent further states, to the best of his impression and belief, that *Major Stone* did examine said judgment, as extended on the docket of August term, 1832, before he gave the aforesaid memorandum by which the *scire facias* issued.

Sworn to, in open court, this 26th day of March, 1846.

W. MITCHELL, Clerk.

The motion of the plaintiff for an instruction from the court here to the clerk of this court, to correct the misprision and mistake in extending original judgment, upon which the writ of *scire facias*, in this cause, issued, by making the same to correspond with the facts and law growing out of the pleadings in the original action and judgment as rendered by the court, was then overruled. The plaintiff appealed.

The plaintiff, after the court had overruled his motion to correct the misprision of the clerk, in extending the judgment, moved the court to allow him to amend the *scire facias*, by reciting the original judgment as actually extended; and with the insertion of a prayer for a writ of enquiry to assess the damages. This motion was also overruled, and the plaintiff again appealed.

The county court then on motion of the defendant, quashed the writ, with costs; and the plaintiff again appealed.

The cause was argued before ARCHER, C. J., DORSEY and MARTIN, J.

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By CAUSIN and T. F. BOWIE for the appellant.

By BRENT and DIGGES for the appellee.

ARCHER, C. J., delivered the opinion of this court.

Two reasons are assigned for the motion to quash the *scire facias*.

1. Because the judgment upon which it issued is an interlocutory judgment, and

2. Because the appellant had no right to prosecute a *scire facias*.

In answer to the first reason, it may be remarked, that if the judgment was interlocutory, the appellee could avail himself of the objection on a plea of *nul tiel record*. The motion to quash the writ, in this case, was not an appropriate remedy. The writ of *sci. fa.* is not defective on its face, but states a good judgment.

But again, it is not an interlocutory judgment. The judgment is for penalty and costs, to be released on payment of ——. The amount of the sum to be paid is not stated.

From this entry of the judgment, we think it indicates a judgment, by confession, for the penalty, to be released upon the payment of such sum as might thereafter be agreed upon; and that it is not binding, as a judgment, until the sum shall be ascertained, as originally contemplated. It has been supposed, that the character of the judgment is to be ascertained by the proceedings and docket entries in the original suit. But we think, that we can only look for that purpose to the judgment, as it has been extended by the clerk. Whether it has been properly extended by the clerk, is not for us, in this suit, to determine. Motions for amendment have been made, but they were necessarily made in the original case, and could only be acted upon by us on an appeal taken in that case.

The second reason assigned, is, that the appellant had no right to issue a *scire facias* in his own name.

The act of 1830, ch. 165, gives the right to equitable assignees of judgments to issue *scire facias* in their own names, to revive the same without administration being granted on the

estate of the legal plaintiff; and it further provides, that in all suits entered for the use of any person, where the legal plaintiff shall die before judgment, the person for whose use the same may be entered, or his representative, shall have power to prosecute the same to judgment as if the legal plaintiff had not died. It has been argued, that as the act has made use of the term equitable assignee in one clause, and *cestui que use* in another, the rights conferred on an equitable assignee to issue a *sci. fa.* was not intended to be conferred on the *cestui que use*; to this proposition we cannot assent. The term equitable assignee is sufficiently comprehensive to include the *cestui que use*; and the right to prosecute a suit to judgment, on the death of the legal plaintiff, is conferred on the *cestui que use*, because he is the equitable assignee of the cause of action; and if he may prosecute to judgment in his own name, and in such name have execution, or a *scire facias*, there is nothing in the reason of the law which would exclude him from having a *scire facias* on a judgment, where he has prosecuted the suit in the name of the legal plaintiff.

The above observations dispose of the motion to quash the *scire facias*.

The only remaining question arises on the motion to amend the *scire facias*, so that it may conform to the judgment, on the supposition, that it was an interlocutory judgment. The judgment of the court below, was, we think, in this respect, right; for as we have before stated, the final entry of the clerk is to be considered, until amended, as the judgment of the court; and as it now stands, it is not an interlocutory judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

**PRISCILLA E. DENT vs. WILLIAM HANCOCK.**—*December, 1847.*

To levy a distress, a landlord for the purpose of making it, and not acting in conformity to the statute on the subject, is not authorized to break open and enter the door of a barn which is barred or bolted, with a view to prevent from without an entry thereat.

But if the door be not so bolted or barred, or is simply shut or latched, with the ordinary means of raising the latch left on the outside of the door, then is an entry at such door lawful to make a distress for rent.

And if a door so bolted or barred be forcibly broken open by a person not acting under the authority or sanction, or at the instance of the landlord, or his bailiff, the person required to make such distress, is authorized to enter for that purpose at the door thus forcibly broken open.

When the relation of landlord and tenant existed to the end of the year 1843, the rent was in arrear, and the landlord in 1844, had rented the premises to another person; but the first tenant had locked up a quantity of tobacco in a barn on the premises, which the landlord had taken as a distress; the fact that the tenant was not in possession of the demised premises when the distress was levied, would not make the entry for the purpose of a distress lawful.

It is the duty of counsel, if aware of objection to the admissibility of evidence, to object to it at the time it is offered to be given—or if unapprised of such objection at the time of its offer, he must raise his objections in a reasonable time thereafter.

If he cross-examine the witness in regard to the inadmissible evidence, or offer testimony to contradict or explain it, a purely legal objection, which is disclosed on the face of the proof itself, the objection afterward comes too late.

The objection is equally too late when a prayer has been first made upon the evidence, or when the argument of the cause before the jury has commenced.

The rules above stated, are not applicable to a case where the cause of objection depends on matters of fact, of which the party objecting has then for the first time acquired a knowledge.

The landlord has no authority forcibly to break open a door, for the purpose of levying a distress, though property be fraudulently deposited in the house to prevent a distress.

The statute 11 Geo. 2, ch. 19, gives no warrant for such a proceeding.

**APPEAL from Charles County Court.**

This was an action of *replevin*, brought on the 15th February, 1844, by the appellee, against the appellant, for a lot of tobacco. The property was replevied and delivered to the appellee. The defendant below, the appellant, avowed the taking of the property, for that the appellee for a space of three years, ending on the 31st December, 1843, held and enjoyed



the said, &c., as tenant of the said *Priscilla*, by virtue of a certain demise made, at the yearly rent of \$110, payable annually, which was unpaid, &c.

The plaintiff in replevin denied:

1st. The demise.

2nd. That he did not possess and enjoy the said place, &c., by virtue of a demise from the said *Priscilla*.

3rd. That no part of the rent claimed was in arrear.

4th. That in the levy of the said alleged distress for the rent avowed to be due, the said *Priscilla* did break and forcibly enter the farm and premises of the said *W.*, and took and seized upon the goods and chattels, &c.

5th. That after the making the demise, and before the rent became due, or in arrear, the said *P.* entered wrongfully into the said close, and put out the said *William* from a great part thereof, and held and kept him out, &c.

6th. That before the levying of the distress, the said *Priscilla* did not make the affidavit of the amount of rent alleged to be due and in arrear, nor did she annex to the warrant of her bailiff an account of the rent in arrear, nor did she give any authority to the bailiff to make a distress.

The avowant joined issue on 1st and 2nd and 3d pleas, which tendered issues to the country, and demurred generally to the 5th plea, and she also traversed the 4th and 6th pleas, on which issues were also made up.

The jury found a verdict for the plaintiff.

At the trial of this cause, the defendant *Priscilla E. Dent*, to support the issues joined upon her part, gave in evidence to the jury by *James E. Keech*, a competent witness, that the plaintiff in this cause, *William Hancock*, rented a farm of the said *Priscilla E.* for the year 1843, at the yearly rent of \$110 per annum, and that the said *William's* tenancy ceased at the end of the year 1843, which said rent was in arrear and unpaid, on the 10th February, 1844. The said *Priscilla E.* further proved by *Nathan S. Dent*, that the property in this case was distrained for said rent, on the 10th February, 1844, upon the premises so rented as aforesaid. That said distress

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was made by the witness as bailiff of the said *Priscilla E.*, under, and by virtue of a written warrant from the said *Priscilla E.* to the said witness. The said *William* then gave in evidence to the jury, by the said witness, *Nathan S. Dent*, that a certain *William K. Dent* gave to the witness as bailiff as aforesaid, the papers in relation to said distress, including the warrant to him as bailiff, with orders from the said *Priscilla E.* to the witness, to make said distress, and further asked said witness, if he did not treat said *William K.* as the agent of said *Priscilla E.*, to which the witness replied that he did; said witness being further asked if he acted under the direction of *William K.*, in making said distress, replied that he did not, but further stated, that at the time the said *William K. Dent* gave him the written authority to distrain from *Priscilla E. Dent*, he told witness that her, *Priscilla E. Dent's*, instructions were, that he, the bailiff, should levy upon the tobacco of plaintiff, but that this was before they went to the barn. The witness further stated, that he had known *William K. Dent* to act as the agent for *Priscilla E.*, in the transaction of her business, and about the time of this transaction, he knew of no other person who attended to business for her, and being asked if he, the said *William K.*, was general agent of *Priscilla E.*, he answered he did not know. The said *William* further proved, that the said *William K.* went with the witness upon the premises aforesaid, and that said *William K.* opened the door of a barn, and that immediately after the said *William K.* opened said door, the witness entered and made the distress. That said witness was present when *William K.* opened the door, and that said *William K.* opened said door without any authority or direction from said witness, the bailiff. Said witness further proved, that one of the doors of said barn was locked and the others closed, and that the door which *William K.* opened, was closed, but whether fastened or not the witness could not say. That *William K.* used no implement in opening it except his hands. The said witness further proved, that the said *William*, the plaintiff, was not tenant, or residing upon said farm at the time the said distress

was made, but that said premises had been rented for the year 1844, by certain other persons, from the defendant *Priscilla E. Dent*, but whether they were residing there or not at that time, the witness did not know. The said *William* then proved by *Mr. Ware*, that he had seen the key of said barn in the possession of the said *William*, several times between 1st January, 1844, and 10th February, 1844, and also afterwards. That some five or six days before the levying of this distress, the witness had barred upon the inside two of the doors of the barn, and locked the third, and gave the key to the plaintiff, and that he, said *William Hancock* then left the farm, and that he did not, nor to his knowledge did the plaintiff return to it again until after the distress. The said witness further proved, that immediately after the distress laid, the said *William K.* and *Nathan S. Dent*, told plaintiff in his presence, that they had levied said distress.

The plaintiff then prayed the court to instruct the jury, that if they find the foregoing facts to be true, then the plaintiff is entitled to recover. To which instruction the defendant objected, and upon all the foregoing evidence, the said *Priscilla E.* then prayed the court to instruct the jury,

1st. That if they find from the evidence in this cause, that the said *William K. Dent* opened the door of the barn without any authority or directions from the said *Priscilla E.*, or *Nathan S.* her bailiff, and that neither the said *Priscilla E.*, or her bailiff, aided or abetted said *William K.* in opening said door, but that the same was voluntarily done by said *William K.*, and that said *William K.* was not the agent of the said *Priscilla E.*, or *Nathan S.* at that time, that then the said plaintiff is not entitled to recover upon the issues joined to the 4th plea of said plaintiff.

2nd. The defendant by her counsel further prayed the court to instruct the jury, that if they find that the door of the barn opened by *William K. Dent* was closed only at the time of said opening, and not fastened, then the plaintiff is not entitled to a verdict upon the 4th plea.

3rd. The said *Priscilla E.* then prayed the court to instruct

the jury, that if they find from the evidence in this cause, that said barn was not in the possession and under the control of the plaintiff at the time of levying said distress, then said plaintiff is not entitled to a verdict upon the issue joined to the 4th plea.

4th. The said *Priscilla E.* further prayed the court to instruct the jury, that the declarations of *Wm. K. Dent*, mentioned in the foregoing testimony, are not admissible evidence in this cause.

5th. The said *Priscilla E.* further prayed the court to instruct the jury, that if they find from the evidence in the cause that said barn door was fastened to prevent said *Priscilla E.* from levying said distress, and for the purpose of clandestinely removing said tobacco from the premises aforesaid before a distress could be levied thereon, then the plaintiff is not entitled to a verdict upon the 4th issue.

6th. The defendant further prayed the court to instruct the jury, that if they find from the evidence in this cause she was the owner of said real estate, and that the lease under which the plaintiff possessed said property terminated upon the 1st day of January, 1844, and that said plaintiff at the time said distress was levied, had removed from the premises, leaving only the tobacco, then, that the defendant had a right to enter upon the premises and take possession of all the houses thereon, and for the purpose of levying a distress, had a right to open the barn doors in which said property was at the time of the distress made.

But the court refused to give the several instructions as prayed by the defendant, and with respect to several of them, are of opinion that they are without the issues, and that there is no evidence before the jury which has a tendency to prove the facts on which said prayers seem to be based, and the court upon the prayer of the plaintiff give the following instruction.

If the jury shall believe from the evidence, that the property claimed by the plaintiff in this case was the property of the plaintiff *Hancock*, left by him on the premises which he had leased the previous year, and for which rent is claimed by avowant, and that the distress mentioned in the pleadings made for the avowant by a certain *Nathan S. Dent*, deriving



his instructions and authority through one *William K. Dent*, then the avowant by her avowry and pleadings in this cause, recognizes the acts done in the seizure of the property distrained, and is answerable in law for any illegal opening of the door of the house in which the goods distrained then were; and if the jury also believe from the evidence, that the door in which the property distrained as aforesaid was opened by the said *William K. Dent*, and therefore, the house was entered and the property seized by said *Nathan S. Dent*, as mentioned in the above statement of facts, then the plaintiff is entitled to the verdict on the *fourth* issue in this cause. To which refusal of the court to give the several instructions, or any one of them as prayed by the defendant, as well as to the instruction given by the court, the defendant excepted.

The defendant prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MARTIN, J.

By McLEAN for the appellant, and

By J. M. S. CAUSIN for the appellee.

DORSEY, J., delivered the opinion of this court.

After the testimony in the cause had been closed, as appears by the bill of exceptions, “the plaintiff then prayed the court to instruct the jury, that if they find the foregoing facts to be true, the plaintiff is entitled to recover.” Which instruction being objected to, “upon all the foregoing evidence, the said *Priscilla E.*, by her counsel, then prayed the court to instruct the jury, that if they find, from the evidence in this cause, that the said *William K. Dent* opened the door of the barn without any authority or directions from the said *Priscilla E.*, or *Nathan S.*, her bailiff; and that neither the said *Priscilla E.*, or her bailiff, aided or abetted said *William K.* in opening said door, but that the same was voluntarily done by the said *William K.*; and that the said *William K.* was not the agent of the said *Priscilla E.*, or *Nathan S.* at that time; that then the said plaintiff is not entitled to recover, upon the issue joined to 4th plea of said plaintiff.”

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The refusal of the court below, to grant this, the appellant's first prayer, forms the first subject submitted to our review in this court. The only issue joined on the fourth plea, was, whether "the said *Priscilla E.* did break and forcibly enter the barn and premises of the said *William*, in making the distress complained of. The prayer concedes, as it might well do, that to levy a distress, a landlord, for the purpose of making it, and not acting in conformity to the statute on the subject, is not authorized to break open and enter the door of a barn which is barred or bolted, with a view to prevent from without an entry thereat. But if the door be not so bolted, or barred, or is simply shut or latched, with the ordinary means of raising the latch left on the outside of the door, then is an entry at such door lawful, to make a distress for rent. And if a door so bolted or barred be forcibly broken open by a person not acting under the authority, or sanction, or at the instance of the landlord, or his bailiff, the person required to make such distress is authorized to enter for that purpose at the door thus forcibly broken open. The facts, therefore, which by this prayer were made the basis of the instruction prayed, if found by the jury, entitle the appellant to a verdict on the issue joined on the fourth plea. The court therefore were in error, in not granting the first prayer of the appellant.

By the second prayer, "the defendant, (below,) by her counsel, further prayed the court to instruct the jury, that if they find, from the evidence in the cause, that the door of the barn, opened by the said *William K. Dent*, was closed only at the time of said opening, and not fastened, then the plaintiff is not entitled to a verdict upon the fourth plea." For the reasons stated by this court, in their decision upon the appellant's first prayer, the county court erred in refusing to grant the second prayer.

In the third prayer, "the said *Priscilla E.*, by her counsel, further prayed the court to instruct the jury, that if they find, from the evidence in this cause, that said barn was not in the possession, and under the control of the plaintiff at the time of levying said distress, then said plaintiff is not entitled to a

verdict upon the issue joined to the fourth plea.” In refusing this prayer, the county court were clearly right. The prayer concedes the forcible breaking open and entry into the barn, and the levying of the distress as stated in the fourth plea; but prays the court to instruct the jury, that if the barn were not in the possession of the appellee, that he was not entitled to recover, under the issue joined on the fourth plea; so far from such a fact, as to possession, justifying the course pursued by the appellant, it had no tendency but to aggravate the illegality of the distress; and showed that it was wholly unlawful, whether the entry into the barn were made with or without force.

The appellant’s fourth prayer, was, that the court “instruct the jury, that the declarations of *William K. Dent*, mentioned in the foregoing testimony, are not admissible evidence in this cause.” Whether the objections taken to the testimony were well founded or not, it is deemed unnecessary to inquire, because they were not made in due time. It is the duty of counsel, if aware of the objections to its admissibility, to object to the testimony at the time it is offered to be given, or if unapprised of such objections at the time the evidence had gone to the jury, he must raise his objections within a reasonable time thereafter. If he cross-examine the witness in regard to the inadmissible testimony, or offer testimony to contradict or explain it, a purely legal objection, which is disclosed on the face of the testimony itself, afterwards, comes too late. And the objection is equally too late, where a prayer or prayers have been first made to the court upon the evidence in the cause, or where the argument of the case before the jury has commenced. To allow a greater latitude, as to the time of raising such objections to testimony, might be productive of much inconvenience and injustice. It would give to the party having the right to object to the evidence, an opportunity of speculating on contingent advantages, that might result to him from the admission of the objectionable evidence. By such silent acquiescence, he might mislead the opposite party, and induce him to offer testimony, which in connection with the

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objectionable proof, might establish his rights; but if deprived of such connection, might be ruinous to his interests. What has been said, as to the time when objections to testimony should be urged, is not to be applied to a case where the cause of objection depends on matters of fact; of which the party objecting, has then, for the first time, acquired a knowledge. In the county court's refusing the appellant's fourth prayer, it committed no error.

By the appellant's fifth prayer, the court below is prayed "to instruct the jury, that if they find, from the evidence in the cause, that said barn door was fastened to prevent said *Priscilla E.* from levying said distress, and for the purpose of clandestinely removing said tobacco from the premises aforesaid, before a distress could be levied thereon, then the plaintiff is not entitled to a verdict upon the fourth issue." According to all the proof in the cause, the county court were clearly right in refusing this prayer. The barn being part of the demised premises, the appellant had no authority forcibly to break open the barn door for the purpose of levying the distress; notwithstanding the tobacco was deposited there for the fraudulent purpose assigned in the prayer. *The Stat. of 11 Geo. 2, ch. 19*, gives no warrant for such a proceeding, even if the requisition of the statute, as to the constable or peace officer, had been complied with.

The court below were in no error in refusing the appellant's sixth prayer; the testimony in the cause being wholly inconsistent with the instruction prayed for. The county court having refused all the prayers of the appellant, upon the prayer of the plaintiff, gave two instructions to the jury; in each of which it was in error, according to the opinion expressed by this court, on the refusal to grant the appellant's first prayer.

We concur with the county court in their refusal of the appellant's third, fourth, fifth and sixth prayers, but dissenting from its refusal of the first and second, and from its instructions given on the prayer of the appellee, its judgment is reversed, and a procedendo awarded.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.



**ELIZABETH LEWIS vs. THOMAS A. BURGESS.**—*December, 1847.*

Awards being intended to compose disputes, are entitled to the most favorable regard; and should receive such construction, if possible, as will give them force and effect; the same may be said of arbitration bonds.

The condition of a bond was to keep the award of, &c., chosen to determine of and concerning the rent, that ought to be paid by *B.* to *L.* for her dower, in her deceased husband's estate, now owned and possessed by the said *B.* The arbitrators awarded that *B.* should pay to *L.* annually, the sum of, &c. for her dower. There is nothing in the language of either the bond or award, to restrict the application of either to the time past, or to the future.

The legal effect of such a contract will be to place each of the parties in the condition in which they would have been, had a lease been executed at the annual rent named in the reference, of all the dower interest of *L.*, commencing when *B.* first had possession of the land encumbered with dower.

**APPEAL from Charles County Court.**

This was an action of debt brought on the 19th July, 1842, by the appellant against the appellee.

The action was founded on the following bond:

Know all men by these presents, that I, *Thomas A. Burgess*, am held and firmly bound unto *Elizabeth Lewis*, in the sum of \$1000, to be paid to the said *Elizabeth Lewis* or her certain attorney, &c., to which payment well and truly to be made, I bind myself, my, &c., firmly by these presents, sealed with my seal and dated this 6th August, 1833. The condition of the above obligation is such, that the above bound *Thomas A. Burgess*, his, &c., do, and shall well and truly stand to, obey, observe and keep the award and decision of *Alexander Gray* and *Noble Barnes*, arbitrators indifferently named and chosen, as well for and on the part of the above bound *Thomas A. Burgess*, as of the above named *Elizabeth Lewis*, to determine of and concerning the rent that ought to be paid by the said *Thomas A. Burgess* to the said *Elizabeth Lewis*, for her dower or one-third part of her deceased husband's estate, now owned and possessed by the said *Thomas A. Burgess*, provided the said award be made in writing, and ready to be delivered to the said parties on or before the first day of September next ensuing, then, &c.

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After *oyer* prayed and granted, the defendant pleaded general performance.

The plaintiff replied that the said *Noble Barnes* and *Alexander Gray*, the arbitrators named in the condition of the said writing obligatory, having taken upon themselves the burden of said award, and having carefully examined all matters and things relating thereto, by their award in writing, did award as follows, to wit: "That the said *Thomas A. Burgess* shall pay to the said *Elizabeth Lewis*, annually, the sum of \$53 33, for her dower, or one-third part of the rent of said land." And the said plaintiff avers that the said award was made in writing, and ready to be delivered to the said *Elizabeth Lewis* and *Thomas A. Burgess*, on the 17th August, 1833, and that said award was delivered to the said parties therein interested on the day and year last aforesaid. And the said plaintiff further avers that said defendant entered upon said land, and used and occupied the same for a long space of time, to wit: the space of five years next before the issuing of the writ original in this cause; and that the said defendant for the space of five years as aforesaid, has held and used and occupied the dower interest and right of her, the said plaintiff, of, in and to said land. And the said plaintiff avers that she has performed and kept all the conditions required of her by said award. Nevertheless, the said defendant, &c.

The defendant demurred generally to the replication of the plaintiff, and the county court sustained the demurrer and rendered judgment for the defendant. The plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MARTIN, J.

By C. McLEAN for the appellant, and

By J. M. S. CAUSIN for the appellee.

CHAMBERS, J., delivered the opinion of this court.

The true interpretation of the arbitration bond, and the conformity of the award thereto, are the only questions made before us in this case.

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Awards being intended to compose disputes, are entitled to most favorable regard, and should receive such construction, if possible, as will give them force and effect, and the same may be said of arbitration bonds.

The facts apparent on the face of the bond, are that the appellee had purchased and held possession of land which once had been owned by the husband of the appellant, and that she being entitled to dower in the land, was willing to receive rent in lieu of a specific assignment, and the appellant preferring such an arrangement, the arbitrators were to determine the amount of rent. The authority given by the bond is “to determine of and concerning the rent that ought to be paid by the said *Thomas A. Burgess* to the said *Elizabeth Lewis*, for her dower or one-third part of her deceased husband’s estate, now owned and possessed by the said *T. A. Burgess*.”

We see nothing in this language to restrict its application to the time past, or to the future. She was to have rent for her dower in land which the appellee had held, and which there is nothing to show he was to be dispossessed of.

The award is certainly deficient in respect to form. It expressly decides however, the material point—the annual value to be paid by the appellee to the appellant “for her dower or one-third part of the rent of said land,” obviously intending to comply literally with their authority, but transposing the words used in the bond.

The mischiefs suggested in the argument cannot ensue from this construction of the bond and award.

The legal effect will be to place each of the parties in the condition in which they would have been, had a lease been executed at the annual rent named by the referees, of all the dower interest of the appellant, commencing at the period when the appellee first had the possession of the land encumbered with the dower right of the appellant.

With these views we must reverse the judgment of the county court.

JUDGMENT REVERSED, AND PROCEDENDO.

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Hoffar and wife vs. Dement.—1847.

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ANCUS M. HOFFAR AND WIFE vs. JULIANA E. DEMENT,  
*Ad'x of GEORGE DEMENT.—December, 1847.*

*J.* died seized of a tract of land, leaving four children his heirs-at-law. *N.* without authority, sold the land to *D.*, who entered upon it, and used it. The same land was afterwards sold under decree, by *N.* to *D.* In an action for use and occupation by one of the heirs of *J.*, to recover her portion of the rent between the period of the two sales, it appeared that *D.* had admitted his obligation to pay rent or interest on the purchase money, and promised to execute his note for the separate interest of the plaintiff on such rent. Held, that as *D.* entered under the contract of purchase, and not under any agreement or demise with the heirs of *J.*, jointly or severally, to pay rent, this action could not be maintained.

In the action for use and occupation, the relation of landlord and tenant must be established between the plaintiff and defendant.

In this State, the children of parents who die intestate, seized in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the act of 1820, ch. 191, sec. 5.

Whatever be the number of coparceners, they all constitute but one heir; are connected together by unity of interest, and unity of title.

Coparceners cannot separately maintain an action for money had and received against a person who had received the rent of their land as trustee, nor recover in separate actions, upon an implied demise, upon a count for use and occupation.

Where an action is brought by one of several, with whom a contract has been made, the defendant may take advantage of it upon evidence at the trial, upon the plea of *non assumpsit*.

Admissions in a conversation, made by a defendant to a witness, who was *not* the agent of the plaintiff, nor had any authority to make a demand, and to account, that he, the defendant, was liable to pay the plaintiff for the rent of property, and intended to give his note for it, is no evidence to support a count of *insimul computassent*.

APPEAL from Charles County Court.

This was an action of *assumpsit*, commenced on the 3rd March, 1845, by the appellants against the appellee. The defendant pleaded *non assumpsit* and limitations. The jury found a verdict for the defendant.

At the trial of this cause, the plaintiffs, to support the issues on their part joined, gave in evidence, that *Joseph N. Stone-street* died several years ago, leaving four children, of whom *Ellen Hoffar* was one; that he left at his death, which



happened about 1825, a tract of land in *Charles* county, the title to which descended to said children; that about 1831, the testator of defendant entered into possession of said lands, and occupied the same until his death, in September, 1843. And that said lands would rent for \$300 per annum. The plaintiffs then further proved, by *Walter Mitchell*, that being employed as attorney for the plaintiffs, and of *Catharine Stonestreet*, another child of *Jos. N. Stonestreet*, he saw defendant's testator in August, 1843, as he believes, and demanded of him, for the occupation of said lands, the said rent, to be charged from the date of an illegal sale by *Nicholas Stonestreet*, to the date of a public and authorized sale in 1836, at which said *George Dement* had purchased under a decree of sale duly passed. That said *Mitchell* then told said *George Dement* that he must settle this claim or be sued. *Dement* said that he was bound for the rent of the land, between the period of the first or illegal sale by *Col. N. Stonestreet*, and the sale under the decree of the court of equity; that it was not necessary to sue him. He only wished to see *N. Stonestreet*, to see what was done with his *Mechanics Bank of Alexandria* paper, placed in the hands of *Col. Stonestreet*, to see how the dividend had been applied. It was a hard case. And as soon as he did so, he would pay either the amount of rent, or the interest of the purchase money, as rent. It was not a matter of much moment, as the difference was not very great; no precise amount to be paid was agreed upon. He never denied his liability to pay rent, as he said he knew the first sale was made without authority, that he thought he ought not to pay for rent more than the interest on the purchase money; as when he purchased the land, he supposed *Col. Stonestreet* had authority to sell. Witness had a statement showing the annual rent and annual interest, which *Dement* did not dissent from. The amounts, &c., witness does not recollect. The rent demanded, and which he agreed to pay, was three years. The plaintiffs also proved, that before this suit was brought, and since the accruing of the rents as aforesaid, the said *Ellen M.* had intermarried with the said *Ancus M. Hoffar*; and that at the bringing of this suit, *E. N. Stonestreet*, one of

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the children of said *Noble Stonestreet*, was an infant. The plaintiffs further proved, by *W. B. Stone* that before the institution of this suit, he, as the attorney of *Dr. Francis Neale*, guardian of said *Noble Stonestreet*, then an infant, demanded of the said defendant's testator the amount claimed as coming from him to the said infant. That the said testator then agreed to pay his ward's separate part, being one-third, to said guardian, of the amount of interest upon the purchase money of land, which testator alleged he had contracted to buy of *Col. Stonestreet*, belonging to the heirs of *Jos. N. Stonestreet*; and which the testator had occupied two or three years, under said contract, prior to a former legal sale, by order of the equity court, the precise amount of this interest and number of years for which it was due, was, at the time of this conversation, spoken of, and agreed upon—the amount and time not now certainly recollected by the witness; but according to his recollection, was \$240 to \$250 per year for three years. The witness then asked for the separate note of the testator for said ward's shares of this amount; and for the purpose of inducing said testator to settle the same. That witness stated, that if he would give his note therefor, payable to said guardian, that the said guardian would assign said note to the administrator of said *Nicholas Stonestreet*, so that the said testator could settle any claims that he had against said *Nicholas* in his life-time. That in stating this inducement, the witness had plenary powers from said guardian. That said testator acknowledged his liability, and promised to execute the note as above stated, and for the said purpose, but never did. That the amount of said note was to be for the separate interest of said infant. And the said testator agreed to settle with the other heirs separately; but he claimed in said conversation to be only responsible for the interest on the purchase money for said land, which he averred had been sold to him by said *Nicholas Stonestreet*, at a private sale; and which interest was agreed between said testator and witness to be only for the time between said private sale, and the public sale in 1836, as aforesaid. That the note was to be executed at the next visit of said testator to

*Port Tobacco*, but he died shortly after; and that if the said note had been given, the said *Stone* would consider that it ought, by the agreement made, to have been assigned to the administrator of said *Nicholas Stonestreet* as proposed by him. Upon the whole evidence, the defendant prayed the court to instruct the jury, as follows:

That the plaintiffs are not entitled to recover under the first count in the declaration, (which was for use and occupation on a *quantum meruit*,) because there is no evidence to show that the defendant's testator had occupied the land mentioned, by permission of the said plaintiffs, or either of them; and because the promises stated in said count, are variant from the promise stated in the evidence; and because the evidence shows no right in the plaintiffs to maintain a separate suit in their own names, without joining the other children of said *J. Noble Stonestreet*. That the plaintiffs are not entitled to recover under their second count, (an *insimul computassent*,) because there is no evidence to show the ascertainment of any precise amount of indebtedness on the part of defendant's testator to plaintiffs; and because the evidence shows no right of action in the plaintiffs, separate from the other children of *J. Noble Stonestreet*.

And that the plaintiffs are not entitled to recover under the third count, (money had and received,) because there is no evidence of defendant's testator having received any money to the separate use of the plaintiffs. And the court (*MAGRUDER*, C. J., and *C. DORSEY*, A. J.,) being of the opinion, that if a recovery could be had at all upon the testimony in this suit, the several heirs of *J. N. Stonestreet* should be united as plaintiffs. And furthermore, that there was no proof in the case from which the relation of landlord and tenant, between the plaintiffs alone and defendant, can be inferred. And that there is no proof to enable the plaintiffs to recover upon the other counts in the declaration, gave the instruction as prayed. The plaintiffs excepted.

The plaintiffs prosecuted this appeal.

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The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MARTIN, J.

By J. M. S. CAUSIN for the appellants, and

By T. F. BOWIE for the appellee.

SPENCE, J., delivered the opinion of this court.

This is an action of *assumpsit*. The declaration contains three counts. The first, for use and occupation; the second, on an account stated; and the third, for money had and received. The defendant pleaded *non assumpsit* and limitations.

*Ellen M. Hoffar*, the wife of *Ancus M. Hoffar*, the plaintiffs in this action, was one of the four children of *Joseph N. Stonestreet*, who died intestate, seized of the real estate, to recover for the use and occupation of which, by the defendant's testator in his life-time, this action was instituted. The county court decided, that the plaintiffs could not recover on the first count in the declaration, because all of the heirs of *Joseph N. Stonestreet* should have been made plaintiffs; and because there was no evidence from which the relation of landlord and tenant could be inferred between the plaintiffs, and the defendant's testator; and that there was no evidence in the cause which entitled them to recover under the second and third counts.

There is no evidence in the record of any express agreement or demise between these plaintiffs, and the defendant's testator, for the use and occupation of the lands mentioned in the declaration; but the proof is, that the defendant's testator entered upon the premises under a contract of purchase from *Nicholas Stonestreet*.

The first question to be disposed of, is, whether the county court erred in deciding that the plaintiffs could not recover upon the first count in the declaration? We think they did not. The defendant's testator entered upon the land under a purchase from *Nicholas Stonestreet*, subsequent to the death of *Joseph Stonestreet*; there is no evidence of any express demise or agreement, to rent by the heirs of *Joseph Stonestreet*,



jointly or severally; in fact the evidence is conclusive that there was none. The plaintiffs, to maintain this action, then must rely upon an implied demise or agreement, to establish the relation of landlord and tenant between *George Dement*, the defendant's testator, and the children of *J. N. Stonestreet*.

*Tindal, C. J.*, in the case of *Decharms vs. Horwood*, 10 *Bingham's R.*, 526, expresses his opinion in this unequivocal language: "The authorities all agree, that whatever be the number of coparceners, they all constitute but one heir—they are connected together by unity of interest, and unity of title." In Maryland, the children of parents who die intestate, seized in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the act of 1820, ch. 191, sec. 5; and the conclusion is irresistible, that if they cannot separately maintain an action of assumpsit, for money had and received, against a person who had received the rent in the character of trustee, (as was decided in the case of *Decharms vs. Horwood*,) that they cannot recover in separate actions upon an implied demise or agreement to rent, upon a count for use and occupation.

It was insisted in the argument on the part of the appellant, that the non-joinder could be taken advantage of by plea in abatement or demurrer only, and not upon evidence at the trial. This position is not tenable upon authority. "As where an action is brought by one of several with whom a contract has been made, the defendant may take advantage of it upon evidence at the trial, upon a plea of non-assumpsit." 1 *Saund. R.*, 153, note 1. 1 *Chit. Pld.*, 7. 2 *Strange*, 820.

The county court decided that there was no evidence which entitled the plaintiffs to recover on the second count. The evidence given by *William B. Stone*, a witness on the trial, of admissions of the defendant's testator made to him, will not maintain the second count in the plaintiff's declaration, upon an account stated.

There is no evidence in the record to show that the witness, *Stone*, to whom the admissions relied on were made, was the agent of the plaintiffs, or had authority to make a demand, or

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to account with the defendant's testator, the conclusion is from the evidence, that he was not authorised.

An admission in conversation to a third person, not the plaintiff's agent, is not sufficient to sustain a count upon an *insimul computassent*. *Greenleaf on Evidence*, 105.

There is no proof which even tends to maintain the issue on the third count.

JUDGMENT AFFIRMED.

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THOMAS S. ALEXANDER AND MARGARET A. GHISELIN *vs.*  
ROBERT GHISELIN AND OTHERS.—*December, 1847.*

Under the act of 1805, ch. 110, and its supplements, the trustee of an insolvent is not restricted in his sales to what he has in actual possession. Property in the hands of a tenant, a bailee, or a trespasser, or mortgagee of more value than the debt, may be sold.

The design of the 7th section of that act was to allow full force and effect to an execution levied, as a lien or incumbrance, in connexion with which words, the process is mentioned, but not to determine nor indicate by whom the sale was to be made.

The act of 1805 and its supplements, require the trustee to take into his possession all the estate and effects to which the insolvent had *the right of possession* at the time of his application, and to sell and dispose of *all* his property in possession, reversion or remainder, and pay off the liens and incumbrances thereon, and to regard an execution as a lien upon personal property, only in the case where it was actually levied before the insolvent's petition.

In the case of the personal estate, it secures to the execution creditor a priority over all judgments not in the same condition, by making his debt a specific lien on the property seized in execution.

The law has given to the trustee the entire management of the estate, subject to the control of the court by whom he is appointed; charging him with the duty of paying off liens and incumbrances, to which the estate might be subject.

An agreement to mortgage personal property alone, to secure a debt due from the one contracting party to the other, to be performed forthwith, is not affected by the statute of frauds; but if it had also related to land, it would have been within its operation.

An equitable mortgage may be enforced against others than the contracting party.

Although the exception in the act of 1729, ch. 8, sec. 5, is broad enough in terms to defeat a *bona fide* purchaser, who has paid his money on the faith of a legal transfer or security, to be forthwith executed, if the rights of a creditor should happen to intervene; still it is not always to have that construction, but has been so considered in equity, as to avoid many of the inconveniences which a literal interpretation of it would inflict.

A court of equity may specifically execute a contract for a mortgage or other equitable lien against creditors.

The rule that equity regards as done that which was agreed to be done, is part of our law. The instances in which it has been enforced, and against the very terms of the registry acts, are numerous.

A written contract to execute a mortgage, clearly expressed, made *bona fide*, and for full value, raises an equity for the party claiming under such contract, that prevails over the legal rights of creditors.

If a contract be as well established, it imposes the same moral and equitable obligation to perform it when verbally made, as if made in writing, and the legal effect of the terms of the agreement will be the same, in the one case, as in the other.

Courts of equity have properly required, that every agreement should be clearly and explicitly established, before it will lend its aid to enforce it.

*G.* held a mortgage on real estate, the first incumbrance; she was prevailed on to agree that it should be postponed in favor of individuals, who were expected to loan the mortgagor a further sum of, &c. to pay off and discharge liens on his estate and other debts; on condition that she should receive as additional security, a mortgage on her mortgagor's negroes. Two persons had promised to loan the amount on receiving mortgages, to which hers should be postponed; and it was expected by all that the required sum would be raised on these terms. The deeds were prepared, as well the mortgages to the persons who were to loan the money, as the mortgage to *G.* on the negroes. A mortgage to one of the persons who was to loan a part of the money, was also prepared and executed by *G.* and her mortgagor; but the other who had agreed to loan the balance declined doing so, and the amount was not procured. *Held*, that *G.* had performed the condition on her part, so far as to be entitled to specific execution of the agreement, to give her a mortgage on the negroes to the extent of the sum borrowed.

In a court of law, a party claiming under a contract must claim according to its terms. If he venture to speculate on a contingency, over which he has no control, he must abide the issue; and if the event does not occur, as he has assumed, the contract is at an end.

But even at law, if one party be prevented by the other from performing the contract, he can recover from that other, by showing a performance of as much as it was permitted him to perform, and a readiness to perform the residue.

The rule in equity is much more broad, and permits a party specifically to enforce a contract, who has performed so much of it as to incur loss, if he is in no default for not performing the residue.

Another creditor of the mortgagor, participating in the arrangement by which

G's first lien was to be waived, and her debt further secured by the lien on his negroes, finding that his claim would be postponed for many years, required of the mortgagor, who agreed, that he should likewise have a security on the negroes. *Held*, that the terms of this agreement were neither vague nor uncertain.

An existing creditor demanding specific security for his debt, and obtaining the promise of the debtor to comply, is to be considered in a court of equity, as favorably as a creditor, who at the moment of becoming a creditor, obtains a pledge for a specific security.

The existence of a debt at law is a consideration for an express promise, equivalent to the advance of an equal amount for the transfer of property, and ought to be a sufficient basis in equity on which to rest an agreement, fair in all other respects, and will sustain an agreement by a debtor to give a specific lien to a creditor.

When a case is before the court on the motion to dissolve an injunction, and on bill and answer, the answers are to be taken as true, so far as they affect the interests of the defendants respectively making them, and so far as they are responsive to the bill; and the statements of the bill are to be received as true, so far as they are not denied.

It is proper as a general rule, very rarely, if ever, to be departed from, that an injunction bond should be required, when an application is allowed that delays the recovery or receipt of money, or which lessens or in any respect endangers any existing securities, or renders liable to loss thereby, any money, profits, or property, which the adverse party is by injunction prevented from receiving or enjoying.

Where a judgment creditor had sued out execution, and levied it upon the personal property of the defendant, who afterwards applied for relief under the insolvent laws, and a trustee was duly appointed, upon a bill filed by other creditors of the insolvent claiming a specific lien by way of mortgage on such property, and the insolvent's trustee, for an injunction to arrest the sale of the property by the sheriff. *Held*, that the complainants were entitled to such injunction, but that a bond should have been filed and approved before it issued.

In general, where an injunction issues without bond, the defendants may petition for an order of court, requiring bond to be given by a reasonable period, or on default, to have the injunction dissolved.

But when the answers have come in, and they show on their face a case for a perpetual injunction, and the continuance of the writ was not dependent upon a question of law or fact to be established, it would be wholly unnecessary to require a bond.

**APPEAL** from the equity side of *Prince George's* County Court.

The appeal in this case is from an order passed on consideration of bill and answers, dissolving an injunction, which had been granted on the bill, to stay a sale of negroes, under



executions issued out of that court, on judgments recovered against the defendant, *Robert Ghiselin*, in favor of other defendants.

The bill which was filed on the 11th Nov., 1846, states, that a certain *Robert Ghiselin*, is, and at the date of the transactions hereinafter particularly detailed, was largely indebted unto your orator *Thomas*, and especially in the sum of \$6000 on his promissory note, for that sum, dated on the 24th February, 1844, as by said note, marked A, and filed as part of this bill will appear; which said debt was chiefly for monies advanced by your orator *Thomas*, to pay judgments against the said *Robert*. That the said *Robert* was, and yet is indebted unto your oratrix *Margaret*, in the sum of \$10,000, besides interest, which was secured by a mortgage of said *Robert's* real estate, now recorded amongst the land records of said county; and a copy whereof, to be marked B, your orators propose hereafter to file as part of this bill. And that the said *Robert* was, and yet is indebted unto divers other persons, in large sums of money, which are secured by judgments, entered up in *Prince George's* county court against him. That sometime in the spring of 1845, the said *Robert* proposed to borrow from certain *Thomas Edmonson* and *John Glenn*, the sum of \$15,000, with which he proposed to pay off and discharge the liens on his estate, other than his debt due to your oratrix *Margaret*; and also to retire certain paper, on which your orator was liable, as endorser, and accepted for him. To effect this object, it was necessary that the incumbrance held by your oratrix *Margaret*, should be postponed in favor of the individuals who were expected to make such advances; and your oratrix *Margaret*, who is the mother of the said *Robert*, was therefore prevailed to agree, to waive or postpone her said incumbrance for such purpose, on condition, that she should receive an additional security, by way of mortgage of the said *Robert's* negroes. And your orator *Thomas*, who was privy to, and participating in the arrangements aforesaid, finding that payment of any part of his large claim would necessarily be postponed for many years, required, and upon his requisition, the said *Robert*

agreed, that your orator should likewise have a security and indemnity upon said negroes. And your orator *Thomas*, therefore, at the request of the said *Robert*, prepared first, the draft of a mortgage, from the said *Robert* to the said *Edmonson*, to secure payment of the sum of seven thousand dollars, or thereabouts, in which your oratrix *Margaret* was to unite as a party, for the purpose of waiving her aforesaid incumbrance, in favor of the said *Edmonson*. In the next place, a draft of a like mortgage, from the said *Robert* to the said *Glenn*, to secure the payment of the sum of eight thousand dollars, or thereabouts, on which a like agreement was to be made by your oratrix *Margaret*, for postponing her lien in favor of said *Glenn*. And lastly, by a draft of a bill of sale, by said *Robert* to your orators, of his stock of negroes, to secure their claims as aforesaid. That the draft first within described, is now in possession of said *Robert*; that the second is now in the office of the clerk of *Prince George's* county, deposited for record, and having been executed, under the circumstances hereinafter detailed; and the last was lately re-delivered by said *Robert* to your orator, and is marked C, and filed as part of this bill; and your orators pray leave to file a copy of the deed, from said *Robert* to said *Glenn*, as a part also of this bill. That at the time of making the aforesaid agreement, and of preparing the drafts aforesaid, they had no notice whatever of the insolvency of the said *Robert*, nor any reason for believing that he was in fact insolvent, or designed or contemplated an application for the benefit of the insolvent laws; and consequently, there was not, and could not have been any intention on the part of any of the parties, to give an undue and improper preference to your orators. On the contrary, the said *Robert* assured them, (and they believed said assurances,) that his debts did not exceed the sum of \$40,000, whilst his property, if sold at any time, would yield \$60,000 at the least; and it was from their confidence in the truth of such statements and assurances, that your oratrix *Margaret* consented to waive her lien as aforesaid; and your orator *Thomas* failed to require a more available security. And your orators further charge, that at

the time of the agreement aforesaid, the only security held by your orator *Thomas*, consisted of a claim, or part of a claim, assigned by one *Robert Bowie* to the said *Robert Ghiselin*, to reimburse monies, which the said *Ghiselin* had been, before that time, compelled to pay, as surety for the said *Bowie*, to extent of two thousand dollars, or thereabouts; and which monies had been borrowed by the said *Ghiselin*, from your orator *Thomas*; and it had been therefore agreed, between the said *Ghiselin* and your orator *Thomas*, that the proceeds of said claim, when collected, should be paid over to your said orator *Thomas*, in payment of so much of his claim against the said *Ghiselin*; and in confident reliance on the said agreement, your orator *Thomas* consented, that the judgment which had been recovered against the said *Ghiselin* as surety for said *Bowie*, and on which the payment aforesaid was made, *should be entered satisfied*. And your orators further charge, that the aforesaid drafts, as soon as prepared, were delivered to the said *Robert*, with the distinctly expressed understanding amongst the parties aforesaid, that whenever, and so soon as your oratrix *Margaret* should execute the mortgage and agreement aforesaid, the said *Robert* should and would execute the aforesaid bill of sale; so that they might be, at one and at the same time deposited for record. And your orators further show, that the completion of the agreement and arrangement aforesaid, was delayed from time to time, because of various circumstances connected with the title of the said *Robert*, until in or about the month of September, 1845, at which time, misfortunes, which had most unexpectedly involved several of his friends, admonished your orator *Thomas*, of the impropriety of suffering his large claim to remain unsecured; and he therefore addressed himself to the said *Robert*, urging his right to a sufficient and available security, for payment of his aforesaid claim; and in return, he received from the said *Robert* a letter marked D, and filed as part of this bill; wherein the said *Robert* expresses his belief, that he would be able to settle his affairs; and promises, and engages, in case he should be disappointed in this expectation, to secure your orator *Thomas*

amply. At this moment, your said orator had no notice of the insolvency of the said *Robert*, or of the extent of his liabilities; and being a brother-in-law of said *Robert*, could not do otherwise than acquiesce in the wish expressed by the said *Robert*, that your said orator would allow some further time for making a settlement of his affairs. But your orator confidently expected, that so soon as the said *Robert* should have accomplished his proposed arrangements, or should have discovered his inability to effect them, he would have prepared and sent to your said orator the security he had promised; and in this expectation and confidence, shortly after the receipt of said letter, he permitted the said *Robert* to receive the money collected on the assignment, made by *Robert Bowie* as aforesaid, and appropriate the same to the payment of judgments outstanding against him, and to enter up satisfaction of said judgments. And your orator *Thomas* further avers, that lately, and after the negotiations of the said *Robert*, for raising money as aforesaid, had entirely failed, he again applied to the said *Robert* to make unto him the promised security; but the said *Robert* now alleged, that he was insolvent, and contemplating, as probable, an application for the benefit of the insolvent laws, any security given to your said orator as aforesaid, would be an undue and improper preference; and since that time, the said *Robert* has applied for the benefit of the insolvent laws, and your said orator has been appointed his trustee, and has bonded as such. But your orator charges, that at the times of the aforesaid oral and written agreements, between the said *Robert* and your orator *Thomas*, there was no law to prevent the giving of security, at the solicitation of a creditor; and that your orator, by relinquishing his right, to receive a large sum of money on account, and in faith of the agreement aforesaid, is purchaser of the benefit thereof, for a valuable consideration, and that down to the time of the application of said money, and for months thereafter, he had no notice whatever of the insolvent circumstances of said *Robert*, and did not imagine it was, or would become necessary for him to seek relief from the insolvent laws. Now, your orator herewith exhibits a state-



ment of his claim for money due him, marked E, and prays the same may be taken as part of this bill. He is unable at this moment, to prepare a schedule of his liabilities, for the said *Robert*; but will do so in the progress of this suit. And your oratrix *Margaret*, further charges, that shortly after the agreement aforesaid, first herein before mentioned, and the preparation of the drafts aforesaid, the said *Robert* presented to your oratrix *Margaret*, the draft secondly within mentioned, being the draft intended for the benefit of the said *Glenn*, and desired your oratrix to execute and acknowledge the same, which your oratrix accordingly did, and the same has been placed in the office for record, and herewith your oratrix files a copy, marked F, and prays it may be taken as part of this bill. Your oratrix avers, that at the time of executing and acknowledging said deed, she verily believed, and chiefly from the fact, that it was in the hand-writing of your orator *Thomas*, and one of the very drafts prepared by him as aforesaid, that it was to be made under the agreement aforesaid, and had no doubt that the said *Robert*, (who is her eldest child, and to whom she has at all times entrusted the management of her affairs,) would have immediately executed, and placed on the record a bill of sale of his stock of negroes, to your orators as aforesaid, and from her very great confidence in him, has always believed it was so executed until within a very few days last past, when she discovered it had not been done. Your orators have no doubt, that the failure of said *Robert* to execute said bill of sale, proceeded from his hope, that he would succeed in procuring the balance of the sum required, to relieve him from *embarrassment*, and his belief, that it would be in time to execute the said bill of sale thereafter; and they are advised, that they cannot be injured by his delay as aforesaid, but that they are purchasers for a valuable consideration, and as such, are now entitled to full indemnity, out of the stock of negroes agreed to be conveyed to them as aforesaid.

And your orator *Thomas* further charges, that before the application of the said *Robert* for the benefit of the insolvent laws, and before your said orator had any notice whatever, of

the execution of the deed from the said *Robert* and your oratrix *Margaret*, to the said *Glenn*, he prepared the draft of a bill in equity, to be laid before your Honors, claiming for himself, as sole complainant, the benefit of the aforesaid agreements, and laid the same before eminent counsel, residing in the city of Baltimore, for advice; and by said counsel, was advised to file the same in this court; but before said application, conversing with a friend who had far better opportunities of knowing the extent of the said *Robert's* pecuniary embarrassments, on the subject of said claim, he was assured that your orator *Thomas'* loss could not exceed one thousand dollars; and to save such sum, his said friend, and your said orator, both concluded it was not expedient, under the circumstances, to insist on his equities aforesaid. And your said orator was the more readily induced to act on this suggestion, as he believed he would have the opportunity of prosecuting his claim for a priority, on the distribution of the proceeds of sales in insolvency, in case it should turn out that the deficiency in the value of the estate should prove greater than was anticipated. And your orator *Thomas* admits, on several occasions he had stated, that he would not litigate his aforesaid claim in equity, against the general creditors of the said *Robert*, many of whom were his personal and intimate friends, in order to save a thousand dollars, or such sum; and he avers, he is yet unwilling to prosecute a claim to any priority over said creditors, for the sake of one, or even two thousand dollars; but that he has been induced to depart from his aforesaid intention, to withhold his claim until the estate was about to be distributed in insolvency, from his conviction, that the loss to the general creditors must be far greater than was originally anticipated; and that their losses are to be aggravated by the efforts now making by judgment creditors of the said *Robert*, to force a sale of his negroes, under executions. And furthermore, your said orator now has great reason to apprehend, and verily fears, that the security of your oratrix *Margaret* is endangered by the execution of the mortgage of the said *Robert* and *Margaret*, to the said *Glenn*, and the failure of the said *Glenn* to place

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the said mortgage on record, until within a few weeks, last past; and being the son-in-law of said *Margaret*, and having been influential in prevailing on her to assent to the arrangements proposed, for relief of said *Robert*, he has deemed it his duty to make a timely effort to vindicate her claims; and he is advised, that a failure on his part, to claim the benefit of an agreement, made for their common security, whilst he was asserting her right to the benefit thereof, would have an unfavorable influence on a future application, on his part, to enforce the same, for her protection.

But now, so may it please your Honors, certain creditors of the said *Robert*, that is to say, *Michael B. Carroll, Thomas Holland, &c., John Glenn, John W. Walker, John Edward Bird*, and the *President, Directors and Company of the Farmers Bank of Maryland*, having recovered or purchased up judgments against him, as by short copies thereof, marked G, and filed as part of this bill, appears, have issued their executions, and seized said negroes, or some of them, and are now about to have them sold for their judgments, as aforesaid. Whereas, your orators are advised, that by force of the appointment and qualification of a trustee, for the benefit of the creditors of said *Robert*, the said executions were so far superseded as to vest the property and possession of said negroes in the said trustee, to be sold by him; and your orators hereby consent, that said trustee may sell and dispose of said negroes, and that the proceeds of such sales may be disposed of by your Honors in equity, or in insolvency, according to the just rights of all the claimants thereof; or, if this cannot be done, then your orators insist upon their equity, to a specific performance of the aforesaid agreement, and a consequent sale of said negroes, or such part thereof as may be necessary, for satisfaction of their aforesaid claims; or, in the event, that said judgment creditors have, in the estimation of this court, acquired any priority over said orators, then they insist that they ought to be entitled to the benefit of the liens of said judgments, as against all other property of said *Robert*.

To the end therefore, that the defendants hereto, may an-

swer the several matters and things herein before charged; and that your orators may have such relief in the premises as their case may require, and in the mean time, that the said judgment creditors may be enjoined from all further proceedings on their executions aforesaid, against the aforesaid negroes; may it please your Honors to grant unto your orators the writ of injunction against the said *Michael B. Carroll, &c. &c., John Glenn*, and the *President, Directors and Company of the Farmers Bank of Maryland*, commanding and strictly enjoining and restraining them, and every of them, from proceeding further with their aforesaid executions, until the further order of this court. And also, the writ of subpœna to the said *Robert Ghiselin* and *Michael B. Carroll, &c.*

Exhibit A, is the original promissory note of *Robert Ghiselin* to *Alexander*, dated 24th February, 1844, for \$6,000, with interest.

Exhibit B, is a copy of the mortgage from *Robert Ghiselin* to *Margaret A. Ghiselin*, dated 25th November, 1834, of all the mortgagor's real estate, to secure the payment of ten thousand dollars, with interest.

Exhibit C, referred to in the foregoing bill:—

Whereas, *Robert Ghiselin*, by his certain indenture of mortgage, dated on the 25th of November, 1834, did convey unto *Margaret Ann Ghiselin*, of said county, certain real estate in said county, in order to secure to her the payment of the sum of ten thousand dollars, current money, and interest as in said indenture is more fully expressed. And whereas, the said *Margaret Ann Ghiselin*, at the instance and request of the said *Robert Ghiselin*, hath agreed to waive her priority of lien on said premises in favor of certain *Thomas Edmonson* and *John Glenn*, and to enable him the better to secure the payment of large sums of money now due and owing from him unto them. And whereas, the said *Robert Ghiselin* is also indebted unto *Thomas S. Alexander*, in the sum of six thousand dollars, current money, besides interest on the promissory note of said *Robert Ghiselin*, for said sum, dated on the twenty-fourth day of February, in the year eighteen hundred and



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forty-four. And the said *Thomas S. Alexander* is also liable as endorser of promissory notes of the said *Ghiselin*, discounted at *The Farmers Bank of Maryland*, for his accommodation. Now, know all men by these presents, that the said *Robert Ghiselin*, for the purpose of securing, in the first place, unto the said *Margaret Ann Ghiselin*, the payment of the sum of money so as aforesaid due and owing unto her, and interest thereon. And secondly, unto the said *Thomas S. Alexander* the payment of the sum of money, so as aforesaid due and owing unto him, and interest thereon. And also, lastly, to indemnify the said *Alexander* against all, and all manner of liabilities which he may have heretofore assumed, or hereafter may assume, on account of the said *Robert Ghiselin*, and in consideration of the sum of one dollar, current money, to him in hand paid by the said *Margaret Ann Ghiselin* and *Thomas S. Alexander*, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said *Margaret Ann Ghiselin* and *Thomas S. Alexander*, their executors, administrators and assigns, all and singular the negro slaves of him, the said *Robert Ghiselin*, and now in their possession, with their and every of their increase, to have and to hold the aforesaid negroes, with their increase unto, and to the use of the said *Margaret Ann Ghiselin* and *Thomas S. Alexander*, their executors, administrators and assigns; provided, nevertheless, that if the said *Robert Ghiselin*, his executors or administrators, shall well and truly pay unto the said *Margaret Ann Ghiselin*, her executors, administrators or assigns, the aforesaid sum of ten thousand dollars, current money, with interest thereon, according to the tenor and effect of the indenture of mortgage herein before recited, and shall also, whenever he or they shall be thereto hereafter required, well and truly pay unto the said *Thomas S. Alexander*, his executors, administrators or assigns, the aforesaid sum of six thousand dollars, with interest thereon from the date of said note; and indemnify the said *Alexander*, his executors and administrators, from all damage on account of

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his liabilities assumed, or hereafter to be assumed, for and on account of the said *Robert Ghiselin*, then these presents and every thing herein contained shall be void, and of none effect. In witness whereof the said *Robert Ghiselin* hath hereto set his hand and seal, this — day of June, in the year eighteen hundred and forty-five.

This paper was not executed by *R. G.*

Exhibit D, referred to in the foregoing bill :—

OCTOBER 3rd, 1845.

DEAR SIR,—Having intended up, I delayed answering your letter received some days since, as I thought we could talk the subject over, and I could express myself more fully than by letter. The subject has indeed been most harrowing to my feelings, particularly as I find you feel some apprehensions about the safety of my debt to you. I do not anticipate any immediate executions against my property, and do hope yet to force *Robert Bowie* to do something for me. I shall adopt a plan which I feel confident will do it. You shall certainly be made secure, when I find that I shall fail to make my negotiation; but a bill of sale to you at this time, while this matter is still open, would prove most ruinous to me, otherwise I should not hesitate a moment about it. You should however feel easy about it; for my property at but a moderate price would far exceed my debts. This however we can talk about when I see you. I hope you will not express to any one at present, any apprehension about my failing in my negotiation, otherwise it might hasten executions, which I have assurances will be delayed until I can do something. Our love to all.

Yours truly,

ROB'T GHISELIN.

TO THOMAS S. ALEXANDER, Esq., *Baltimore.*

Exhibit E, is the account of the claim of the complainant, *Alexander* against *R. G.*

Exhibit F, is the mortgage from *Robert Ghiselin* to *John Glenn*, dated 10th June, 1845, of his real estate; to secure the payment to *Glenn* of \$8056,30, with interest. *Margaret Ann Ghiselin* unites in this mortgage, for the purpose of

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waiving "her priority of lien on the aforesaid premises, in favor of the said *John Glenn*."

The injunction was accordingly ordered and issued, and being served on the sheriff, the negroes were delivered over to the complainant, *Alexander*, as insolvent trustee.

The separate answer of *Robert Ghiselin* to the bill of complaint of *Margaret A. Ghiselin* and *Thomas S. Alexander*.

This respondent, now, &c., for answer, says: that it is true, he was at, or about the time stated in said bill of complaint, largely indebted to the complainant, *Alexander*, and to the amount stated by him, a large part of which indebtedness was created by borrowing money, to pay off judgments against the respondent; and he also admits his indebtedness to *Margaret A. Ghiselin*, the other complainant; and he also admits his indebtedness to various other persons, by judgments, as stated in said bill. Further answering, he admits, that in the spring of 1845, he proposed to borrow of *Thomas Edmonson* and *John Glenn*, the sum of fifteen thousand dollars, to pay off all the judgments against him, and the mortgage held by *Farmers Bank of Maryland*, of which he did procure from said *John Glenn*, upwards of eight thousand dollars; and this respondent admits, that he proposed to said *Margaret A. Ghiselin*, that if she would agree to postpone her lien upon his lands, so as to enable him to raise said money, he would give her as additional security for her debt, a lien on said negroes; and he further admits, that the said *Alexander* proposed, and this respondent agreed, to give him also a lien on his negroes, as security for his debt, after such fifteen thousand dollars should be raised and received as aforesaid; but he denies that he ever agreed to give such mortgage to the prejudice of the then existing judgment creditors, because it was understood by complainants, as well as respondent, that these were to be first provided for, from said sums of money; and he admits, that the various papers, as stated by said complainants, were prepared by said *Alexander*, at the request of said respondent, and sent to said respondent for execution; two of them only were executed, that is, the mortgage to *Glenn*, and the mort-

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gage to *Edmonson*, the mortgage to *Glenn* only having been delivered, the other was cancelled, the said *Edmonson* not having advanced the amount which the respondent expected to receive from him. And this respondent admits, that said papers, except the mortgage to *Glenn*, always remained in his possession, until written for last fall, by said *Alexander*, when the paper prepared as a mortgage to himself, and *which was not executed by said respondent*, was returned to him by said respondent. And he freely admits, that when these transactions occurred, he had no intention, or expectation of being or becoming an insolvent debtor, but really believed himself able to pay all his debts. He further admits, that said *Alexander* held as his only security for his debt, a claim on *Robert Bowie*, as stated in said bill, the proceeds of which claim were afterwards appropriated by the respondent, as stated in said bill; and he further states, that he does not recollect, that there was any understanding, that said papers should all be executed at the same time; although he does remember, that no mortgage was to be made to his mother, or said *Alexander*, until the mortgage to *Glenn* and *Edmonson* were first made, in order to pay off the said judgments.

This respondent further answering, admits, that having received from said *Alexander* a letter, dated September, 1845, which has been mislaid, he wrote the reply thereto, filed in the said bill. He admits the final application for security, as alleged in said bill, and his refusal to make the same; and he also admits his application for the benefit of the insolvent laws, and the appointment of said *Alexander* as his trustee; and he admits the levy of execution, as stated in said bill.

The joint and several answers of *Henry J. Harrison*, *John W. Walker*, and others, stated, that they are judgment creditors of the defendant, the said *Robert Ghiselin*, for the several and respective amounts, shewn and indicated by short copies of said judgments, filed with the said complainants' bill, marked exhibit G; that some of their said judgments were recovered in eighteen hundred and forty-three and four, as appears from said exhibit; no part of which has been paid them by the said



*Robert Ghiselin*, but the whole amount thereof is still due and unpaid, that they issued executions on said judgments, respectively, returnable to the *April* term of *Prince George's* county court, eighteen hundred and forty-six; but they were not levied upon the property of the said *Robert*; that executions of *fieri facias* were renewed thereon, and were issued from said court on the 28th July, 1846. And all of them were levied upon the negroes and personal property of the said *Robert*, as stated by the complainants, on the 29th July, 1846, long before the application of the said *Robert Ghiselin* for the benefit of the insolvent law of the State, which application was not made until the      day of October last past.

These respondents admit, that the said *Robert Ghiselin* has petitioned for relief under the insolvent laws of the State, as stated by the complainants; and that the said *Thomas S. Alexander* has been appointed his trustee, and bonded as such; and received a conveyance of said insolvent's property as trustee; but these respondents are advised and insist, that his application for the benefit of the insolvent law, and the appointment and qualification of the said *Alexander*, as his trustee, does not supersede or suspend the executions of these respondents, which were issued and levied antecedently to the said application; or in any manner interfere with or impair their right to proceed at law with their executions, and to reap the fruits thereof, by a sheriff's sale of the negroes and property seized and levied upon as aforesaid. These respondents further answering, say, that they know nothing of the indebtedness of the said *Robert Ghiselin*, to the said complainants, or either of them; that they are ignorant of any arrangements or agreements, as stated in the complainants' bill, between the said *Robert Ghiselin* and the complainants, or either of them, in regard to the securing their said mentioned debts, by conveyance in the nature of a bill of sale or mortgage, or in any other way; and they are advised and insist, that even if there were made between the said parties, any such agreements, promises and arrangements, they were secret and private contracts, assurances and agreements, that ought not to receive

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countenance in a court of equity, against *bona fide* creditors; and especially against creditors of the grade of these respondents, whose executions are actually levied before the filing of the complainants' bill.

These respondents further answering, say, that the collection of their said claims on judgment, and the management thereof, was committed to their respective attorneys; and they are informed by them and believe, and they therefore aver, that after said judgments became ripe for execution, they would have ordered executions thereon, with a view to enforce the collection of their debts, but for the repeated assurances of the said *Robert*, that the said *John Glenn* and *Thomas S. Alexander* were making arrangements in *Baltimore* for a loan for him, for about fifteen thousand dollars, with which their said judgments were to be first paid and satisfied; and in consequence of these assurances, and at the repeated requests of the said *Robert*, they forbore to press the recovery of their said debts. And your defendants state, that it was known to the said *Thomas* and *Margaret*, that the defendants were indulging the said *Robert*, under the belief and expectation that the said loan would be made, and their said debts paid thereby; and these defendants aver, that this expectation alone prevented them from causing executions to be issued on their said judgments, and levied long before the time they were issued and levied, as aforesaid. And they also state, that their said counsel did not know that said negotiation had failed, until the month of July or August, 1846; but during all this time their said counsel believed, that the said negotiation would succeed, and the said debts be paid, as they had been so often assured. These respondents further answering, are advised and insist, that all of said agreements, contracts, arrangements and promises, mentioned in the said bill, as having been made and entered into between the said complainants, and the said *Robert Ghiselin*, about the securing of the debts of the said complainants, by conveyances, as mentioned therein, and all the other promises between the said parties stated in the said bill, if such were ever made and entered into, (and about all of which these respondents are totally ignorant,)

are void and inoperative in law, the same not being in writing, under the statute of frauds and perjuries, which is pleaded to the same by these respondents, and relied upon to defend the same, and by way of defence. And these respondents jointly and severally plead, by way of defence to said promises, agreements and contracts, the statute of 29th *Charles* 2, chapter 3, commonly called the statute of frauds, and insist that the said promises and agreements are all void, under the said statute.

These respondents further answering, state, that the said promises and agreements, if ever made to the said complainants by the said *Robert*, from the very terms of them, as appears from the complainants' exhibit of a letter from the said *Robert*, and from the averments of the said bill, *were entirely conditional* and were not to have been carried into effect, unless the said *Robert* succeeded in raising a sum of money by a loan sufficient to relieve him from his embarrassments, and especially from these respondents' judgments, and which he failed to do; the promises were therefore dependent upon a contingency which did not occur, and cannot be enforced even against the said *Robert*. These respondents further answering, insist that the complainants should have given an injunction bond, and they insist the injunction should not have been granted, without bond, in pursuance of the law, and as in duty bound they will ever pray, &c.

The answer of *John Glenn* admitted, that the exhibit A, of complainants, is the promissory note of his co-defendant, *Robert Ghiselin*. He knows nothing of the other particulars of the claim of the complainant *Alexander*, against the said *Robert*, but refers to, and is willing to adopt the answer of the said *Robert*, so far as it relates to the origin, amount and condition of said claim. This defendant also admits, that the said *Robert* was and is indebted unto the complainant *Margaret*, in the sum of ten thousand dollars, with interest; the payment whereof is secured by mortgage, as is more fully stated in said bill. He also admits, that the said *Robert* was indebted unto the *Farmers Bank of Maryland*, in the sum of four thousand dollars, and interest on a mortgage, which con-

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stituted *the first incumbrance on his lands*; and also to divers other persons, on judgments recovered against him, and being so indebted, the said *Robert*, in the spring of the year eighteen hundred and forty-five, applied to this defendant, to procure for him a loan of fifteen thousand dollars, to be applied to the discharge of all the incumbrances on his lands, other than the mortgage of the complainant *Margaret*, his mother. That this defendant examined into the state of affairs of the said *Robert*, because convinced that fifteen thousand dollars was sufficient to relieve the said *Robert*, as aforesaid. And therefore agreed to advance the sum of eight thousand dollars, and entered into a treaty with one *Thomas Edmonson*, for an advance by him of the remaining seven thousand dollars. But the said *Edmonson*, and this defendant, required as a condition, on which their advances were to be made, as aforesaid, that the complainant *Margaret* should agree to waive or postpone the lien of her incumbrance in their favor; and it became necessary to call in the assistance of the complainant *Alexander*, her son-in-law, to explain the circumstance to her, with its probable consequences. And through his intervention, it was agreed, as this defendant heard at the time, both from the said *Alexander* and the said *Robert*, that the said *Margaret* should waive the lien of her mortgage to the above mentioned extent, and in consideration thereof, should receive an additional security, by mortgage of the negroes of the said *Robert*.

This defendant cannot undertake to answer, whether he had or not any notice of any proposed security to be given to the said *Alexander*. But it was understood at the time, by all parties, that the requisite instruments of writing, were to be prepared by the said *Alexander*; and confiding in the information given him at the time, and since, by the said *Robert*, he has no doubt, and admits, that the instruments described in the bill, as intended for the security of this defendant, of the said *Edmonson*, and of the complainants, were prepared, as is stated in the bill, he refers to the answer of *Robert Ghiselin*, which he makes part of this, whether the said *Alexander* was, by agreement as aforesaid, to receive the security, which the



last described instrument professes to give him. And this defendant admits, that it was understood and expected by him, and he supposed by all the parties, that the aforesaid mortgages would have been executed and delivered as soon as they were prepared; and that when the said *Margaret* parted from her lien on the real estate, she was at once to have received the additional security, proposed to be given by mortgage, of the said *Robert's* negroes. And this defendant, in fact, did shortly thereafter receive the mortgage to himself, as is stated in said bill; and did thereupon advance the sum of money therein mentioned, which was applied in payment of judgments and other claims.

That the said *Edmonson* declined to advance the money promised by him, because of an outstanding judgment, recovered against the said *Robert*, as surety of one *Robert Bowie*, and after many delays the negotiation with him was broken off. This defendant further admits, that the complainants' exhibit D, is in the hand-writing of the said *Robert*, and was written by him at the time, and under the circumstances mentioned in said bill. This defendant has been informed by the said *Robert*, and therefore admits, that at the time of the original agreement, the said *Alexander* held an assignment made by one *Robert Bowie*, to the said *Robert Ghiselin*; and that in reliance on the security, to be acquired under the proposed arrangement, he permitted the said *Ghiselin* to receive and apply the money arising on said assignment, to the payment of judgments against him.

This defendant admits, that throughout the year 1845, and until the summer of the year 1846, the said *Robert* was believed to be solvent, and able to pay his debts. He further says, that at the last mentioned date, he had reason to suspect the insolvency of the said *Robert*, and therefore caused writs of *fieri facias* issued on judgments held by him, as stated in the bill, and that the same were laid on the negro slaves of the said *Robert*; and this defendant is advised and insists, that by reason of the levy aforesaid, he has acquired a lien on said negroes, which is to be preferred to the claims of the com-

plainants in said bill; and he further relies and insists on the defences afforded by the statute of frauds, as a complete bar to the relief prayed by said bill, and prays that the injunction heretofore granted on said bill, may be dissolved, and he may be dismissed with costs, &c.

The cause was then submitted on a motion made by defendants, for a dissolution of the injunction, and by an order, dated 23rd April, 1847, the court (KEY, A. J.) dissolved the injunction.

The complainants appealed from this order of dissolution.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MARTIN, J.

By ALEXANDER for the appellants.

The appellants insist that the order dissolving the injunction is erroneous, and that the injunction ought to have been continued.

1st. Because the appointment and qualification of the said *Alexander* as trustee of *Robert Ghiselin*, on the application of the latter for the benefit of the insolvent laws, superseded the executions of the defendants, and vested in him the property which had been taken in execution.

2nd. Because the agreement mentioned in the bill is a valid agreement, and proper to be enforced in equity; and therefore the complainants are entitled to satisfaction of their demands out of the proceeds of sales of the negroes in question, even to the prejudice of the creditors claiming under the aforesaid executions.

3rd. It will be insisted further, that if the execution creditors should appear entitled to a preference over the complainants, the benefit of the injunction ought to be sustained so far as to prevent any further proceeding on the writs of execution; and that the remedy would be by a declaration that the execution creditors are entitled to a preference in the distribution of the funds in the hands of the insolvent trustee, to be administered in insolvency, and that the complainants shall

be subrogated to the rights of the execution creditors, so as to entitle themselves to the benefit of the lien of the judgments and executions against other property of the insolvent, which may be liable therefor.

It is objected that the injunction issued without a bond. It was ruled by Chancellor Johnson, many years ago, that a stranger to a judgment, seeking to enjoin it, need not give bond. He claims under a mere equitable title. The practice is uniform. The complainant here is under no personal obligation to pay the debt. *The Cape Sable Co's case*, 3 *Bland*, 615. 1835, ch. 346. *Alex. Prac.*, 81, 82. *Jones vs. Magill*, 1 *Bland*, 194, *note*.

If the objection is valid, there should have been a rule requiring bond by a given day. The injunction should not have been at once peremptorily dissolved.

The subject of the agreement here is not land, but personal property. Under the statute of frauds, it is objected that the promise relied on in this case was not to be enforced within a year. But that statute only applies where it appears that the agreement was not to be performed within the year. If the contract is in the alternative, it is not within the statute. Here a speedy execution of the agreement was contemplated. Both *Glenn* and *Ghiselin* so designed. The papers are dated in June, 1845; no proof of postponement to end of a year. But the statute is no bar in this case. *Jones vs. Hardesty et al*, 10 *G. & J.* 404.

The act of 1805, ch. 110, sec. 5, 7, superseded the executions issued by the creditors of *Ghiselin*, upon his application for relief under the insolvent laws. The property was vested in his trustee, who is bound to pay all liens, judgments and incumbrances. The act determines what judgments are liens as to lands; as to personal property to create a lien, the execution must have been levied. The general property is in the trustee. The specific property in the lien creditor. A trustee is appointed that there may be a jurisdiction to administer the fund. This operates a supersedeas of the execution and transfer of the property by the policy of the law to the trustee.

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He is authorized to sell for the benefit of all. Creditors rely on their priorities. The appointment of the trustee does not determine the lien absolutely, but only *sub modo*. It restrains the sheriff. There is convenience in the rule. This renders a dissolution of the injunction in this case unnecessary. Under the act of 1799, on injunction, the property goes back from the sheriff to the trustee, who has the general property. It could now only be reached again by a new *fieri facias*; yet in the hands of the trustee, this is prohibited by the act of 1805, ch. 110.

Upon the 2nd point: Could the agreement for a lien been enforced against the original parties? *Mrs. Ghiselin* was an incumbrancer with sufficient security. On the property secured to her it was proposed to borrow \$15,000. She was satisfied with this. She was solicited to postpone her rights. She believed that \$15,000 would relieve her son from embarrassments. If she would agree to postpone her rights, she was to have *additional security* on her son's negroes. Additional security for the relinquishment of a part of prior security, is a good consideration between the parties. She let in *Mr. Glenn* to a preference. She agreed to do the same as to *Edmonson*. This entitled her to the additional security. *Mr. Glenn* advised this course after examination into *R. G's* affairs. He complied; *Edmonson* refused; that part failed. The additional security may avail to the extent of the injury. *Mrs. G's* part was special and limited in its character. It was to be concurrent with acts of other parties. There was a clear execution of the contract on her part. *Alexander* was brought in to induce him to aid the execution of *Mrs. G's* contract, new incumbrances were to be created on lands and negroes. He demanded a second security on the negroes, before he proffered his aid. He had no knowledge of *Ghiselin's* situation. There was nothing to prevent his exacting security. The proof is in exhibit C; this was prepared by *Alexander*. It imports an agreement. He was not to do any thing, but he was to be secured with *Mrs. G*. There is no necessity for a new consideration between debtor and creditor. *Alexander*



agreed to postpone his claim for some years. It was no part of his duty to raise the \$15,000. His duty was only to postpone his claim.

Equity considers as done what ought to be done. A vendor is a trustee for his vendee. The right to a conveyance may be asserted against the vendor or his heirs. A purchaser for value without notice is the only exception to this rule. 2 *Sto. Eq.* 959, sec. 1502. The purchaser must be *bona fide*, and must have paid the purchase money. The equity of vendee for value, is superior to that of judgment creditors claiming under judgments subsequent to the agreement. *Finch et al. vs. Earl Winchelsea*, 1 *P. Wms.* 277, 278. *Hampson vs. Edelen*, 2 *H. & J.* 64.

The equity of vendor for unpaid purchase money, is enforced against the judgment creditor and assignee of the vendee. *Repp et al. vs. Repp et al.*, 12 *G. & J.* 344. *In the matter of Howe*, 1 *Paige N. Y. Eq. R.* 125.

Mortgage defective for want of enrolment established against a judgment creditor. *Taylor vs. Wheeler*, 2 *Vernon*, 564.

A defective mortgage made in consideration of giving up another security enforced against parties. *Tiernan vs. Poor & wife*, 1 *G. & J.* 206. *Brundige et al. vs. Poor & wife*, 2 *G. & J.* 1. *Woods vs. Fulton & Starck*, 4 *H. & J.* 329. *McMechen & Sullivan vs. Maggs*, 4 *H. & J.* 132.

An agreement to mortgage will be enforced against a prior judgment creditor, with notice before purchase. *Massey vs. McIlwain*, 2 *Hill C. R.* 428. The case of *Burr vs. Burr*, 3 *Ves.* 573, 575, 581, is near to *Alexander's* claim. An agreement for a mortgage, a specific lien against creditors. *Exe'r of Polony & Read vs. Keenan et al.* 3 *Dessau*, 74. The same rules extend to personal property otherwise illustrated. *Young vs. Keighly*, 15 *Ves.* 557. *Read vs. Galliard*, adm'r of *T. Simons*, 2 *Dessau*, 552. *Dow et al. vs. Ker et al.* 1 *Spear*, 431, 418. *Fletcher et al. vs. Morey*, 2 *Sto. Rep.* 564. *Burn vs. Carvalho*, 4 *Mylne & Craig*, 690. *Aldridge & Higdon vs. Weems & Hall*, 2 *G. & J.* 36. *Thomas' Exe'r vs. Von Kapff's Exe'r*, 6 *G. & J.* 373. *Depeyster et al. vs. Gould et al.* 2 *Green*,

*N. J.* 481, 374. 2 *Sto. Eq.* 962, sec. 1503. *Minns vs. Morse et al.* 15 *Ohio*, 568. *Richardson vs. Stillinger*, 12 *G. & J.* 483. *Lempriere vs. Pasley*, 2 *Tenn. Reports*, 485.

The complainant is entitled to specific performance, as between parties. As to personal estate, *third* parties cannot object. The creditor has no superior right without a levy on personal property, and the insolvent law supercedes this. Moreover the judgment creditors have other liens. *Evertson vs. Booth*, 19 *John.* 492. Though the contract be not fully performed by *Alexander*, yet he might sustain a bill to protect such interest as he had acquired under his contract with *Ghiselin*. *Corse vs. Patterson*, 6 *H. & J.* 154.

By C. C. MAGRUDER for the appellees.

The appellees will insist that the court below properly dissolved the injunction in this case:—

1. Because the application of *Robert Ghiselin*, for the benefit of the insolvent laws, did not impair the lien acquired by his judgment creditors, by virtue of the executions levied upon his personal property, nor suspend their rights to enforce the said execution, by a sale of the property levied upon.

2. Because the agreement for security, relied upon by the complainants, is denied by the defendants, and if proven, could not prejudice them, being void under the statute of frauds.

3. The agreement between the said complainants and the said *Robert*, should not be specifically enforced, to the prejudice of the said judgment creditors, under the circumstances of the case.

4. That the benefit of the injunction should not be extended to the said complainants, as contended in their third point, to the prejudice of the said judgment creditors, or other creditors of the said *Robert*.

5. The complainants should have given an injunction bond, and their failure to do so was a sufficient cause for dissolving the injunction.

Under the act of 1805, ch. 110, sec. 7, the lien on personal property does not depend on the actual execution of the levy.

It flows from the judgment. The proceeds of all property of the insolvent, after satisfying all judgments, incumbrances, and liens, remain for all other creditors equally. It is the residue that is to be divided. But the execution process is to have some effect. It is something in addition to the judgment. By the execution levied, the creditor obtains a superior, a specific equity. A levy changes the nature of the property. The creditor obtains a qualified property. *Beatty vs. Chapline*, 2 H. & J. 19. *Hanson vs. Barnes*, 3 G. & J. 359.

The act of 1799, ch. 79, sec. 10, shows the effect of the injunction on the sheriff. Since the act of 1826, ch. 157, the property and person of the debtor are released by the injunction from the sheriff's control.

The injunction is not grantable without a bond—1835, ch. 346.

This parol contract is void. *Lammott vs. Gist*, 2 H. & G. 433. There was neither part performance, nor payment here, to take the case out of the statute of frauds. *Lacon vs. Mertins*, 3 Atk. 3. There was concealment here, which would prevent the complainants from taking the fund. *Bliss vs. Thompson*, 4 Mass. 488. The promise to give the mortgage was void. *Boyd vs. Stone*, 11 Mass. 342. The relinquishment of R. G's right to redeem the mortgage to Mrs. G., cannot be proved by parol. *Scott vs. McFarland*, 13 Mass. 309. The terms of the contract are uncertain as to their extent; and equity will not specifically enforce it. *Harnett vs. Yielding*, 2 Sch. & Lef. 548.

Part performance under the statute of frauds. Payment of the purchase money is not sufficient part performance of a verbal contract for land, to take it out of the statute of frauds. *Jackson vs. Cutright & Clark*, 5 Mumf. 318.

There is a distinction between contracts to purchase and mortgage. The latter are not favored nor extended in equity, in view of the statute of frauds. *Ex parte Hooper*, 19 Ves. 477.

Intervening equities will arrest the court in granting specific performance. *Carberry vs. Tannehill*, 1 H. & J. 224.

To enforce this alleged contract under the circumstances, would nullify the act of 1729, ch. 8, which demands that mortgages of personal property to affect third parties, should be acknowledged and recorded within twenty days of their execution. The conditions of this act have not been complied with. *Dorsey vs. Smithson*, 6 H. & J. 61. *Hudson vs. Warner and Vance*, 2 H. & G. 415. *Moale & Johnson vs. Buchanan et al.*, 11 G. & J. 314. *Warnick vs. Michael*, 11 G. & J. 153. *Salmon vs. Claggett*, 3 Bland, 125.

By Wm. H. Tuck for the appellees, upon the 1st, 3d, and 4th points.

1st. The effect of the application and discharge upon the *fi. fas.*, actually levied before that time. An execution authorizes the sheriff to take property and make the debt. A seizure gives him a qualified property in the chattels—that is a property unaccompanied by a right to immediate possession. But yet he has a technical possession, on which he may maintain trespass or replevin. The character of this writ, and the powers and duties of the sheriff, are explained in—*Chapline vs. Beatty*, 2 H. & J. 15.

The judges in that case agree, that the sheriff has a property in the chattel, *special* to be sure; but for the purpose of making the debt, *Judge Gantt* maintains that each party, the sheriff and defendant, had a qualified property. That the defendant might sell or bequeath, subject to the sheriff's property. They all agree that the *fi. fa.* is one entire thing, and cannot be disturbed, except in particular cases provided for by the statute or common law. Thus an injunction did not release the property, although it suspended its execution, until 1799, ch. 79, sec. 10.

And as late as 1826, ch. 147, a defendant taken under *ca. sa.* was not discharged by injunction. Where the plaintiff or defendant dies, the execution may go on, although the property be returned in the inventory. This is by reason of the qualified property that the deceased has in the goods. If a defendant may sell, subject to the levy, what prevents the



deed to the trustee, passing a qualified interest; *it is but a deed at last* of all his estate in the property.

It is contended, that the possession, with an absolute title, must pass under the insolvent's deed, in virtue of act of 1805, ch. 110, sec. 5. But this does not necessarily follow. The words of that act, and of 1827, ch. 70, are technical, and have a technical meaning—the former uses **PROPERTY**, and the latter **ESTATE**. The last act prevails, and must be construed in a technical sense, as referring to the interest of the insolvent, and not to the body of the property. The insolvent cannot convey more than he enjoys himself; and the trustee takes the property, subject to the liens of others. In the cases in bankruptcy, mortgages, &c., the question may not have been raised. Suppose the case of a bill to sell mortgaged real estate, where the mortgagee is not a party, where would be the legal title under the sale? The title passes under a creditor's bill, because the mortgage creditor may come in, and these cases are provided for by law. But on general principles, the legal estate would be in the mortgagee.

The 7th sec. of 1805, ch. 110, does not necessarily suppose that the property passes to the trustee as matter of right. It only means that he shall pay off all liens, &c., as in a case in equity, where the incumbrancer may come in and take satisfaction from the property covered by his lien; or as the case of an administrator or executor, the sheriff may sell, and the plaintiff has a right to the benefit of the lien. Suppose a creditor, under a mortgage, has possession of the property, can the trustee take it from him? He may file his bill to redeem for the benefit of the creditors. What return can the sheriff make to a *fi. fa.* that will discharge him? In this case the return "*enjoined*" will do—but how, where there is no injunction?

The eligibility of this mode of exercising the power of sale—as to cash and credit. Who pays the expenses of this proceeding, the sheriff's fees and trustees' commission? A dissolution of the injunction was unnecessary, because the property had been discharged under the act of 1799, ch. 79,

sec. 10. That act provides that the property shall go back to the defendant. The court had no right to deprive us of the security we had in the sheriff's bond—and turn us over to that of the trustee. This may be immaterial; and if the case on motion to dissolve had gone against us, perhaps we should not have been here at this time. The appeal is just as unnecessary as the dissolution.

3rd POINT. 1st. Was there any agreement at all, as against *Ghiselin*?

2nd. As against his creditors, and especially the defendants.

What is a contract?—*Chitty on Contracts*, 15, 16, 26, 71. *Addison on Contracts*, 33, 4, 5, 6. 1 *Sumner*, 225. They must agree in the same sense, to the same thing. *Newland's Contract*, 151, 152, 224.

What is a contract as to *Mrs. Ghiselin*? She was to release as to \$15,000.—*Did she do it*? The bill admits that she did not execute the deed to *Edmonson*. The answer shews that *Ghiselin* duly executed it. It was sent to him, says the bill, and remained in his possession. It was an entire contract, both as to her and *Alexander*; that is, he was to give the security when the \$15,000 were raised, as a condition precedent, his object being to provide for his creditors. *Addison on Contracts*, 194. *Story on Contracts*, 8, 9. *Am. Jurist*, Oct., 1833, art. 3, p. 251. 3 *Bos. and Pull.*, 300. *Youqua vs. Nixon*, 1 *Pet. C. C. R.* 222. *Stansbury vs. Fringer*, 11 *G. & J.* 150. It is contended, that there can be an apportionment of this consideration; that is, that she is entitled to be secured to the extent of *Glenn's* mortgage. If the contract be entire, this is not so. Suppose she were suing at law for a breach of agreement by *R. G.*, must she not aver a performance, or an offer to perform all she agreed to do? There must be a contract set out, giving a cause of action on both sides. 4 *G. & J.* 467. It is said the bill of sale was the consideration—so it was; but to be delivered only on raising the \$15,000—this was the entirety of the contract; and it was the chief inducement.

4th POINT. *Ghiselin's* answer. Then again, it is said the only condition, on her part, was to release her liens. It makes

no difference that the negotiation partly failed. She had nothing to do with raising the money; and she was not to clear the title, &c. She well knew that she was to have no bill of sale until she released for the whole amount—\$15,000. There was no mistake, surprise or fraud practised on her. She knew all about it. *Mr. A.* was called in to make explanations, &c. And the question is not what she agreed to do, but what *Ghiselin* agreed to do? What was his understanding of the contract?

*Glenn's* answer is relied on to shew that all the papers were to be executed at the same time, as evidence of one entire contract; also on the dates, &c. We say it was an entire contract; but the mortgages were to precede the deed for the negroes—else why did not she call on *R. G.* soon after June, 1845? Why did not they complain of his delay? The answer says, that the security was to be given "*after such \$15,000 should be raised and received, as aforesaid.*" But he denies, &c.

She claims the benefit of a part performance. She is not the only one unhappily connected with *R. G's* embarrassments. She had a security and she lost it,—*but by her own fault.* She should have withheld the deed to *Glenn*, until the other was executed, so that the bill of sale could be demanded under the contract.

She comes in equity relying on a part performance. In all these cases she must offer and be in a situation to perform the rest of the contract on her part. Here she cannot make the offer, because under the present circumstances, the contract cannot be completed. *Buchanan et al. vs. Lorman et al.*, 12 G. & J. 190. There is no averment in the bill, that \$8,000 were raised on *Glenn's* mortgage, or that it was applied under the agreement. The answer of *Glenn* states that \$8,000] were advanced and paid towards judgments *and other claims.* The answer of *Ghiselin* says, the money was to pay the *Bank* and judgments. What has become of the money? The *Bank* is not paid. It is not averred that judgments were paid. Perhaps it has been applied to the withdrawal of the

paper on which *Mr. A.* was liable?—and if so, it was against the agreement as understood by *Mr. Ghiselin*.

2d. Is there an agreement as to *Alexander*? As to him, the first agreement (if any) entirely failed. The Bill and answer shew that his security depended on *R. G.*'s raising the money. The bill states that after the letter of 3d October, 1845, he expected *another deed to be prepared*, and sent him. This abandoned the first agreement. The letter of *Ghiselin* by itself is no agreement, binding the negroes without an acceptance. There is nothing to show that it was an acceptance by *R. G.* of an offer made by *Alexander*. On the contrary, he declines giving a bill of sale, which it is insisted was the proposal of that letter.

The court will not enforce any alleged agreement, unless they can see that it was certain and mutual, and understood by the parties in the same sense. 19 *John*. 205. 12 *John*. 190. 1 *Sumner R.* 224.

The cases cited in argument were express and certain agreements in writing for particular security. *Not demands for security generally*. In all these cases, there was an agreement binding certain ascertained property. We need not examine them, that is the fact. The letter of *Alexander* demanded a sufficient and available security. The answer says you shall be secured on the happening of an event. Nothing is said here about negroes as the security. He may as well claim an equity against all the property. *Mr. A.* could have enforced this agreement against any property, if these negroes had been levied on before the letter.

It is reasonable to infer that he did not mean a bill of sale on his negroes, because they were *morally* pledged to the judgment creditors, and *Alexander* knew it, as appears by the answer. *R. G.* had always refused this, unless they were paid. A bill of sale would be ruinous, &c. Any bill of sale would have the effect of bringing his creditors on him. He may have meant a mortgage. There is no consideration for the agreement set up in the letter.

The prior indebtedness is not sufficient. This was a new



agreement for security. At law, as in equity, it must be mutual, and give each party a cause of action. Suppose *Alexander* were suing at law, what could he say as the consideration of the contract? Suppose the agreement had been, I will sell you the negroes for my debt? 7 G. & J. 404. If *R. G.* had complied, or were to offer to comply, what performance could he claim against *Alexander*? He says the consideration was forbearance in agreeing to postpone his claim for seven years, to *Glenn's* mortgage. He cannot be said to forbear doing what he had no design of doing. It is no where averred that he ever designed suing or taking any steps, until after this letter. The postponement by *Glenn's* mortgage was part of the original contract; and this was abandoned when he demanded a security on different grounds.

But he had nothing to do with this. It is not pretended that his assent was necessary to *Glenn's* mortgage. He was only called on to make explanations, &c., as counsel and friend of the family; and it was made through his intervention. The letter does not offer the security if he would wait longer. As to forbearance. *Chitty on Contracts*, 35. 1 Penn. Rep. 385.

He acquiesced in his proposal for further time. *Alexander* did not consider himself bound by any agreement to forbear, because he prepared his bill, and did not file it, because advised not to do so. The time of this does not appear, but it may have been shortly after Oct. 1845. He does not appear to have had any apprehension of his debt until Sept. 1845.

Another consideration alleged, is the receipt of \$2,000 by *R. G.* This might make him a purchaser of the judgment he paid. He held this security at the time of the alleged agreement. It turned out to be available for \$2000. By crediting *R. G.* again, he has lost it. Can he charge it against this property? If he had kept that security, his claim against these negroes would be \$2000 less—or rather, he would have two securities, which would protect us *pro tanto*. But it is no where alleged that this \$2,000 transaction formed an element of these agreements.

The money was received by *R. G.*, and paid away after the

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letter of 3d Oct. was received. It was a new advance by *Alexander*, and not covered by any preceding agreement. How can that be made the consideration of a previous contract?

The receipt of the \$2000 by *R. G.*, with *Alexander's* permission, was a payment of that sum of his claim for \$6,000, (and on her loan for \$2,000) as against third persons.

Is the contract to be enforced against the defendants?—execution creditors. He says, equity considers as done what is agreed to be done. And hence, because a bill of sale was agreed to be given, equity will treat the property as if it had been given. That is the general rule. But it will not be enforced against a party who has not been in default, or against those claiming under such a party. He who seeks equity must do equity. As to *Mr. Alexander's* lien, when did it become a lien?—conceding that he assented to the letter. Not until the negotiation had failed. When was this? The record does not show. Then our executions may have been levied before it failed; and the onus is on him to show that his lien attached before the executions. 11 *G. & J.* 326.

In the cases cited on the other side, there were clear and explicit agreements. In all the cases cited on our side, where there was any doubt, the court refused to establish them, as well as in those where there was any suspicion of unfairness. In *McMehen vs. Maggs*, 4 *H. & J.* 132, there was express notice of the secret lien. In *Aldridge vs. Hall & Weems*, 2 *G. & J.* 30, the agreement was written on the paper, *which did not require delivery*. *Woods vs. Fulton & Starck*, 4 *H. & J.* 329, creditors were not parties. *Tiernan vs. Poor*, 1 *G. & J.* 216. *Brundige vs. Poor*, 2 *G. & J.* 1, consideration was forbearance, and enforced against the parties only. 6 *G. & J.*, *Thomas vs. Von Kapff*, was an express agreement on record for the security. *Hampson vs. Edelen*, 2 *H. & J.* 64. *Repp vs. Repp*, 12 *G. & J.* 344. *Richardson vs. Stillinger*, 12 *G. & J.* 483, was a case of Vendor vs. Vendee, where the judge says, that all *such secret* or known equities would be enforced. But that is not this case. There are many reasons for the equity as

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against a vendee, that do not apply against others. This was *arguendo* to, and applies to the particular case then before the court; otherwise it would contradict 11 G. & J. 314. That case goes on the ground of agreement, with possession. *We had no notice of this secret equity.* If we had, we might have saved ourselves, by taking other property.

4th POINT. As to the substitution. These creditors have no one to protect them. They are not parties. *Alexander's* duty as trustee is to protect all. We rejected the proposal of the counsel, because we have no power to bind the general creditors by our agreement. And besides, I do not perceive the fairness of making them assignees of judgments against the land, by the use of the trust funds. This substitution cannot take place here, because the general creditors are not parties. It may be done in insolvency.

By T. F. BOWIE, also for the appellees.

There is but one question here. The priority of *Mr. Alexander*, over the judgment creditors of *R. Ghiselin*. He claims under *Mrs. Ghiselin*, but his contract has no reference to hers. His demand is clear of hers. We represent the general creditors' defendants. The answers of *R. Ghiselin* and *J. Glenn* have no effect against us. One co-defendant cannot be evidence against another, under the circumstances here presented. The real defendants are the creditors of *Ghiselin*, against one who seeks to enforce an equity alleged to be superior to theirs. *Warfield vs. Gambrill*, 1 G. & J. 503. And this posture of the case excludes the answers of those co-defendants as evidence, who claim against the general creditors. As respects them, the court can only regard the bill and their answers.

If the complainant have no remedy against *R. G.*, he can have none against his creditors. It would be against conscience to enforce the contract against him. The nature of the alleged contract shows there can be no specific execution. *Alexander* was merely agent, not a contracting party in his own right, nor for himself. The contract was between *Mrs. G.* and her

son, and was to raise \$15,000. She agreed to release him for treating *R. G.* as vendor. There is no breach on his part which would entitle his mother to specific execution. And as respects the mother, the contract was by parol. This was the agreement of June, 1845. The other complainant, *Alexander*, seeks to connect that contract with one of October, 1845, though nothing was added by *Mrs. G.* to the first.

Whether the agreement be in writing, or by parol, with part performance, still it must be specific and certain, both in terms and description of property. This is defective in both. It must be mutual in its stipulations. *Alexander* was not to advance a dollar. To do nothing but act as counsel. *Geiger vs. Green, Ms. Dec., 1846.*

The contract was also indivisible in its nature, which is another ground against specific performance. *Hamilton vs Warfield, 2 G. & J. 482. 13 Ves. J. 328. 1 Sch. & Lef. 32. Prec. in Ch'y, 560. 1 Atk. 12. Stark's Ev. 603, 612.*

*Mrs. G.* has only in part performed this contract; and it became impossible for her, by her own default, to perform the residue. She was to raise \$15,000, or give a lien in advance of her own, to that extent. She stopped at \$8,000. *R. G.* was entitled to all the advantages of the contract, according to its stipulations. The permission to let *R. G.* collect \$2,000 formed no part of *Alexander's* agreement. The original agreement did not call for it; and therefore, it cannot be relied upon, as an act of part performance.

To set this contract up, will be to divert the value of the negroes from all the general creditors.

The contract is void at law and in equity. It is so under the act of 1729, ch. 8, sec. 5, which declares, that no goods or chattels, whereof the vendor, mortgagor or donor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, mortgagor or donor, unless the same be by writing, and acknowledged and recorded, &c. The act, however, not to extend to make void mortgages *against the mortgagor*, or those claiming under him. As respects *R. G.*, he cannot set up this act; but those who



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claim against him may. The act was to remedy the effects of secret conveyances, as distinguished from recorded ones. This case is within the mischief of the act. It is not a case in which an effective registration would be decreed. *Mrs. G.* should not have released her lien until she got an acknowledged mortgage of the negroes to be recorded. The contract is void at law, and equity will not set it up. There is no pretence of notice to the creditors, which would make it inequitable on their part to resist. *Trumbo Ex. Neff vs. Blizzard & Jacobs*, 6 G. & J. 18. *Birely & Holtz vs. Staley*, 5 G. & J. 456. *Stockett vs. Ellicott*, 3 G. & J. 125. *Warnick vs. Michael*, 11 G. & J. 153. *Lamborn vs. Watson*, 6 H. & J. 252. *Moale vs. Buchanan et al.*, 11 G. & J. 326. *Woods et al. vs. Fulton & Starck*, 4 H. & J. 329. *Pannell & Smith vs. Farmers Bank*, 7 H. & J. 202.

By McMAHON, in reply.

In the spring of 1845, *R. Ghiselin's* estate was covered by various liabilities. Mortgage in 1834 to his mother. Judgments in 1843 and 1844. In debt to *Alexander* \$6,000, to pay off judgments. And also variously liable as endorser and acceptor. He opened a negotiation to pay off judgments; and in order to this, applied to his mother; and by contract with her, she agreed to waive her prior liens for an additional security on his negroes. *Alexander* knew all this, and willing to come in posterior to *Mrs. G.*, also desired security for his debt. He thereupon prepared three instruments, to be executed by *R. G.*, one to *Glenn*, one to *Edmonson*, another to *Mrs. G.* and himself. These he handed to *Ghiselin*; as to the instruments, he was to execute and retain them until called for. That to *Glenn*, was executed in June, 1845. *Alexander* had hoped to accomplish the entire negotiation; but it failed, and failed by default of *R. G.* During this period, *Alexander* wrote him, and received replies, in Sept. and October, 1845. After these letters, and in reliance on the original agreement, *Alexander* surrendered a security to him, which enabled him to enter a judgment satisfied. In October, *Ghiselin* sought relief from his creditors through the insolvent laws; and hence

this controversy between his unsatisfied creditors and the complainants.

On the question of latent equity, what is the general rule of courts of equity, in such cases as relates to sales and mortgages?

The equity descends on all those who have no superior equity. *Massey vs. McIlvain*, 2 Hill, 428. Parties and privies are all bound. Agreements binding the conscience are enforced. *Dow et al. vs. Kerr et al.*, 1 Spear, 416, 417. General creditors are bound by a particular equity, if it affects their conscience. Administrators are bound. *Thomas' Ex. vs. Von Kapff*, 6 G. & J. 381. *Taylor vs. Wheeler*, 2 Vernon, 564. The bankrupt law in England does not interfere with this power. *Lempriere Assignees vs. Pasley*, 2 D. & E. 206, 210. *Mogg vs. Baker*, 3 Mees & Wells Ex. 195. *In the matter of Howe*, 1 Paige, 125. *Fletcher et al. vs. Morey*, 2 Sto. Rep. 564. The doctrine is, that with reference to assignees, they take subject to all agreements of this sort. Trustees are also so bound. *Burn vs. Burn*, 3 Ves. 575. *Young vs. Keighly*, 15 Ves. 557. *Hosford vs. Nichols*, 1 Paige, 226. The result is as far as general creditors are concerned, however possessed of the legal estate, they take subject to such equities. Parting with the legal title, the equity attaches to that title. This equity is only arrested by new contracts with the debtor in possession, creating particular equities. The law elects between the vendor and his new creditors. They are misled in such cases. They are ignorant of the secret trust. The new creditor to avail himself of the election, must be a very purchaser for full value without notice. She purchased with notice, there is an end of his equity, and he must purchase a legal title. A purchaser of the equitable title cannot avail himself of the legal title. The purchaser of the equitable title must take notice of prior equities.

Who gives the judgment creditor the lien? He proceeds *in invitum*. The law gives it. For what? Not for the land, but as an indemnity. Liens by operation of law, take only the interest of the debtor. 2 Sto. Eq. 962, sec. 1503, note b.

In England, a deposit of title deeds is an equitable mort-

gage. A creditor by execution takes the interest of the debtor. 2 *Sto. Eq.* 1502, sec. 1228. Lien for purchase money will prevail against a judgment creditor of vendee before conveyance. *Depeyster vs. Gould*, 2 *Green*, 481. As it regards judgment creditors, with or without notice, they take subject to equities. *Taylor vs. Wheeler*, 2 *Vernon*, 564. *Finch vs. Winchelsea*, 1 *P. Wms.* 277. *In the matter of Howe*, 1 *Paige*, 126, 127. *Ex. of Polony & Read vs. Keenan*, 3 *Dessau*, 77. *Massey vs. McIlwain*, 2 *Hill*, 428. *Minns vs. Morse*, 15 *Ohio*, 571. *Hampson vs. Edelen*, 2 *H. & J.* 64. A parol, secret, unrecorded, agreement, founded on value, would be enforced against a subsequent judgment creditor; if binding, he cannot sell the land. *Repp vs. Repp*, 12 *G. & J.* 341. *Richardson vs. Stillinger*, 12 *G. & J.* 483. A sale under *fi. fa.* would not affect secret equities.

We are, however, now dealing with personality, where there is no lien until the execution reaches the sheriff, or at most, until it issues. It is a lien by the law, which shall not work any wrong. 2 *Sto. Eq.* 962, 1503. *State vs. Bank of Md.* 6 *G. & J.* 229. The courts cannot avoid prior equities by awarding executions.

I assume, independent of the acts of assembly, if this contract did create an equitable right, the complainants are entitled to enforce it.

Has the act of 1729 changed the rule or modified it? The difficulty arose in *Twyne's case*, how far conveyance without delivery was a badge of fraud. The possession of a mortgagor being consistent with the terms of a conveyance, did away the fraud. The act of 1729 made continuance of possession conclusive evidence of fraud in certain cases. The act gave the option to deliver up the property, or put your deed on record. Has this case any thing to do with that act? The unexecuted agreement could not be recorded.

Creditors trusting parties *after* incumbrance upon personality, is the mischief under the act of 1729. That act nullifies the contract where parties are trusted after the agreement. Here they were all *prior* creditors, and not within the mischief. It

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relates to actual conveyances of property. The other recording acts show this. By the act of 1763, ch. 14, no estate in slaves to pass, unless by deed recorded. A bond of conveyance could not be recorded until 1831, ch. 305. An agreement for, is not a mortgage. Distinctions have been drawn in other States between real and personal property. 1 *Kentucky Laws*, 428. 4 *Am. Digest*, 389, sec. 5. The act of 1729, meant to prevent frauds by parties to incumbrances; but where a title must be pursued through equity, that was left untouched. Courts would act in each case according to circumstances. Creditors under the act of 1785, could not object to recording such an agreement. The registry laws have nothing to do with equities. 2 *Powell Mor.* 624, note o. These acts do not affect the fundamental principles of equity. *Hudson vs. Warner & Vance*, 2 *H. & G.* 429. *Pannell & Smith vs. Farmers Bank*, 7 *H. & J.* 204. A mortgage for value is analogous to a contract for sale. Security for a debt is likened to a purchaser. *Sto. Eq.* 656, sec. 1229. In *Aldridge & Higdon vs. Weems & Hall*, 2 *G. & J.* 36, a secret equity was enforced.

In *Moale & Johnson vs. Buchanan et al.* 11 *G. & J.* 314, the complainants were only assignees for general creditors, volunteers, not purchasers for value. The property assigned, left out of the deed, and the case never relieved of the statute of frauds, until the assignees took possession. When the *Marine Bank* procured its lien, no right existed to enforce the contract. The delay granted to *R. G.* was only prejudicial to *Alexander*. There was no wrong in the original transaction, and none since. It is as right now, as when it started.

How does the statute of frauds affect this cause? That does not relate to all contracts affecting land. It must be an interest in a sale of land, not a mere collateral agreement affecting it. *Green vs. Vardiman*, 2 *Blackf.* 331. *Addison vs. Hack*, 2 *Gill*, 229.

The pleadings acknowledge the contract with *A.* and *Mrs. G.*, and this takes it out of the statute.

Again, *R. Ghiselin* got a part of the consideration. He was to do another act, raise a further sum. His was the first step



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to be taken. Then *Mrs. G's* priority was to be waived. She was to release. Such was the order of executing the agreement. These are independent acts. At law, the contract would be enforced. *R. G.* got a part of the consideration, and could not stop. It would be unjust in him to keep what he has, without performing his part of the agreement. 1 *Wm's. Saund*, 320. As respects *Mrs. G.*, there was part performance, and readiness to perform the residue. *R. G.* was to convey the negroes for both *G.* and *A.*, on waiving the lien on the land. It was waived. No new interest in land is sought. The statute of frauds does not apply. It would be a fraud to refuse performance after what was done. The lien waived, cannot be resumed. 2 *Sto. Eq.* 77, sec. 760. *Ibid*, 96, 97, 99, sec. 771, 775. As to the consideration of the contract, there is abundant, as respects *Mrs. Ghiselin*. She waives in favor of all liens; comes in last; this puts her in danger; refuse her the personalty, and she has no lien but the ultimate one upon the land; and if that is not enough, she takes as general creditor only. 2 *Sto. Eq.* 656, sec. 1229.

*Mr. Alexander's* contract has also a sufficient consideration. If it was a nude pact, still it was followed by an act done upon the faith of it, to the injury or loss of another. *Train vs. Gold*, 5 *Pick.* 384.

There are two considerations. The original consideration, and the \$2,000 after paid, or given up. All such agreements may be enforced against the general creditors.

Then as to the dissolution of the injunction. The bill is confessed. The creditors, in their answer, do not deny one fact in it. *Mr. Glenn* confesses he knew all about it. There is no latent equity about it. Upon a bill for specific performance, though the case is not fully admitted by the answer, still if enough of specific performance be admitted, the injunction which went with the bill will not be dissolved. 2 *Sto. Eq.* 94, 95, sec. 770. The drafts of the instruments were delivered on the express condition, that *Ghiselin* was to assign the negroes. He declines merely upon the ground of his insolvency. The letter of *Ghiselin* reflects light upon the antecedent transac-

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tions, and is pregnant with the results relied on. *Bradley vs. Wash., Alex. & Geo. T. Steam Packet Co.*, 13 Peters, 98.

As to want of bond, *prior* to the injunction issued. The complainants have an equitable title, were no parties to the judgments, and not bound to pay the debt to the third party. 3 *Bland*, 615. 1835, *ch.* 346, *sec.* 3. 1835, *ch.* 384, *sec.* 4. The bond was, in the discretion of the Chancellor, to require or not. 1 *Bland*, 194. The execution creditors had no right to sell after the appointment of a trustee. The injunction killed the process; the execution was at an end. The act of 1805 places the property in the hands of trustee, for beneficial purposes, to be administered by one hand. It is admitted, the sheriff has a special property, subject to the general property. He may maintain trover, but the law may be changed, and this is what the act of 1805 has accomplished. There ought to be no divided administration. It is so under the bankrupt law of Congress, which is far short of our insolvent act of 1805.

CHAMBERS, J., delivered the opinion of this court.

The first objection to the continuance of the injunction in this case is, that the appointment of the trustee did not suspend the rights of creditors to enforce their judgments.

The 5th section of the act of 1805, *ch.* 110, provides that the insolvent shall convey to his trustee all the property he has in possession. The 7th section directs a sale to be made of all the property conveyed to the trustee, and applies the proceeds to general creditors, after satisfying all judgments, incumbrances and liens; but no judgment to be entered after the insolvent's application shall be a lien on his real property, nor shall any process against his real or personal property have any effect thereon, except writs of *feri facias*, *actually and bona fide levied before such application*.

It is alleged that "the insolvent is to convey what he possesses," the receipt of which the trustee is to acknowledge, the trustee is to "sell what is conveyed," of course he is to sell only what the trustee has in his actual possession. If this be so, then the property in the hands of a tenant, a bailee, or a

trespasser, belonging to an insolvent, is not to be sold—nor a mortgaged estate in possession of a mortgagee, although the mortgaged premises might be worth in a fair market, tenfold the amount of the debt: a construction which results in such conclusions cannot be adopted.

Again it is contended, that the provision, “no process against real or personal property shall have any effect thereon, *except* writs of *fiери facias*, actually and bona fide levied before such application,” virtually asserts, that in the excepted case it shall have effect, and it is assumed that the sale by the sheriff must be the effect intended. This assumption is not warranted. The design of the law was to allow full force and effect to an execution levied as a *lien* or *incumbrance*, in connection with which words the process is mentioned, but not to determine, or in any manner to indicate, by whom a sale was to be made.

The true construction then of the act of 1805, and the supplementary acts relating to insolvent debtors, requires the trustee to take into his possession all the estate and effects to which the insolvent had the right of possession at the time of his application, and to sell and dispose of all his property, whether in possession, reversion, or remainder, and pay off the liens and incumbrances thereon, and to regard an execution as a lien upon personal property only in the case where it was actually levied before the insolvent’s petition.

The effect is certainly an important one. In the case of personal estate, it secures to the execution creditor a priority over all judgments not in the same condition, by making his debt a specific lien on the property seized in execution. There may possibly be cases in which a priority might be acquired over other judgments or incumbrances of equal date, in respect to real estate.

The leading and general design of all bankrupt and insolvent laws, is to insure a prompt and complete settlement of all the affairs of the party, and an early distribution amongst the creditors, as nearly in equal proportions as a regard to positive and acknowledged preferences will admit. To facilitate these objects, our law has wisely given to the trustee, to be appointed

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by the court, the entire management of the estate, subject of course to the control of the court by whom he is appointed, charging him with the duty of paying off liens and incumbrances, to which the estate might be subject. His duty requires him to make the earliest disposition and settlement regarding the interests of all the creditors—the particular lien creditor included—and brings all the claimants before one tribunal, whereas, by allowing sheriffs and mortgagees to participate in the administration of the trust, adverse interests are created, delays endangered if not ensured, and probably different, and possibly conflicting tribunals consulted.

The next ground of defence against the claim of the appellant, is that the agreement relied on in the bill, not being in writing, is void by the statute of frauds. If the assumption taken in the argument, that the alleged contract related to *land* as well as *personal* property, were well founded, it would be fatal. But the contract stated, and which the bill asks to have enforced, is an agreement to mortgage personal property alone. The debt was due from the party contracting, not the debt of another, and it was to be performed forthwith, so that the provisions of that statute do not affect it.

It is said however, that the registry acts, and particularly the act of 1729, ch. 8, make it void, as against creditors. This objection goes to the whole extent of the position, that an equitable mortgage cannot be enforced, except against the contracting party. No exception is made in the act, the terms of which are broad enough to defeat a bona fide purchaser, who has paid his money on the faith of a legal transfer or security, to be forthwith executed, if the rights of a creditor should happen to intervene, although the creditor had full notice of the transaction. There certainly is great difficulty in any general legislation on the subject, to avoid individual cases of serious hardship. The manifest injustice and oppression which a rigid execution of these registry acts according to their letter, would occasion, has led courts of equity to construe them as they have the statute of frauds, in a way to avoid many of the inconveniences and injuries which a literal



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interpretation would inflict. How far in the aggregate the benefits of such a construction exceed the mischiefs, it is not the province of this court to decide. Wise and experienced jurists have differed in their opinions as to which would have been the more judicious course. All however agree, that a literal construction was not adopted, and to abandon at this period the precedents of all past time, would be to unsettle titles to property, destroy an entire system of chancery jurisprudence erected upon the supposed equity of these laws, and matured with the concurrence of many legislative enactments, and throw doubt and confusion over a large and important branch of the law, most intimately affecting the rights of every species of property.

Certainly it would be a novel doctrine in *Maryland*, to assert that the Chancery court cannot specifically execute a contract for a mortgage, or other equitable lien against creditors. The rule that "equity regards as done that which was agreed to be done," was imported with other parts of the system by our ancestors. The instances in which it has been enforced, and against the very terms of the registry acts, are numerous.

The every day occurrence of proceedings to enforce a conveyance bond, is a familiar instance. Who doubts the authority of a Chancery court to direct a conveyance, where the party in possession, under a bond of conveyance has paid the purchase money; or that the title would prevail against creditors whose judgments were intermediate between the creation of the equitable title by the bond, and the legal title by the decree and deed? and yet our registry laws all the while declare that no estate in the lands for above seven years, shall pass, alter or change, except by a conveyance formally acknowledged and registered within a limited period.

Indeed, some of the appellee's solicitors did not deny that a written contract to execute a mortgage clearly expressed, made bona fide, and for full value, would raise an equity for the party claiming under such contract, that would prevail over the legal rights of creditors. The decisions of this court in the cases referred to at the bar, so clearly establish this doctrine that it

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is impossible to doubt it. They object however, that this contract is not in writing. It is asked by way of answer to this objection, by what law is a written contract required? The equity is as great, all other considerations being equal, in the one case as the other. The danger of mistake, and the greater facility of obtaining false testimony in the proof of a verbal agreement, has occasioned statutory enactments, distinguishing them in certain enumerated cases. In all others they are on the same footing; personal property may be transferred in many instances, and the title pass by parol contract. We know of no decision which has asserted that a contract to execute a mortgage for personal property, may not also be by parol, except in the cases which the statute of frauds requires to be in writing. On the contrary, several of the cases cited were on parol contracts. See *Mogg vs. Baker*, 3 *Mees & Wels.* 195. *Massey & McIlvain*, 2 *Hill*, 421. *McMeichen & Maggs*, 4 *H. & J.* 132. If the contract be as well established, it imposes the same moral and equitable obligation to perform it, when made verbally, as if made in writing, and the legal effect of the terms of the agreement will be the same in the one case as the other.

The greater difficulty of proving the precise terms and import of the agreement is necessarily incurred by the party setting it up, and courts of equity have properly required that every agreement shall be clearly and explicitly established, before they will lend their aid to enforce it.

A further objection to the contract alleged in this bill is, that it has not the certainty and explicitness required, so far as regards the alleged agreement with *T. S. Alexander*, and with regard to that, with *Mrs. Ghiselin* it was contingent, and that she has not performed the condition on which it was to depend.

And first, as to *Mrs. Ghiselin's* agreement: the statement is, that she held a clear mortgage, so far as it appears, the first incumbrance for \$10,000 on the whole real estate, said to be worth \$40,000: thus secured, she was prevailed on to agree that this incumbrance should be postponed, in favor of the individuals who were expected to loan the sum of \$15,000 to

her son, to pay off and discharge the liens on his estate and other debts, on condition that she should receive as additional security, a mortgage on the negroes of her son. Two individuals had promised to loan this amount on receiving mortgages, to which hers should be postponed, and it was confidently anticipated by all, that the \$15,000 would be procured on these terms. The deeds were prepared, as well the mortgages to the persons who were to loan the money, (one of which for \$8,000, was executed both by *Mrs. Ghiselin* and her son) as the mortgage to *Mrs. Ghiselin* on the negroes. In this condition of things, the person who had agreed to loan the remaining \$7,000, declined doing so, and the amount could not be and has not been procured.

In a court of law, a party claiming under a contract must claim according to its terms. If he venture to speculate on a contingency, over which he has no control, he must abide the issue, and if the event does not occur as he assumed, the contract is at an end. But even at law, if one party be prevented by the other from performing the contract, he can recover from that other by showing a performance of as much as it was permitted him to perform, and a readiness to perform the residue.

The rule in equity is much more broad, and permits a party specifically to enforce a contract, who has performed so much of it as to incur loss; if he is in no default for not performing the residue. The argument must assume that *Mrs. G.* was to procure a lender before she can be in default. Such certainly was not the case. Her contract was to release to the persons from whom her son was to procure the loan. If *Edmonson* had refused, and another person had been found by *Robert Ghiselin* willing to make the loan on the same terms, she was bound by her contract to release to such other person. But it was the office of *Robert Ghiselin* to find the lender, and it was his failure to do so, that made it impossible for her to release according to her contract.

She is therefore in the attitude of a party who has performed so much of the contract as it was possible, and ready

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to perform the rest, but prevented from doing so, by the act of the other contracting party. This part performance has occasioned a postponement of her lien to the extent of \$8,000; she is not therefore, as the authorities describe it, “in statu quo.” To this extent, she is injured by her part performance, and is entitled therefore to a specific execution of the contract, or to such relief as in the altered condition of the property is equivalent thereto.

Then, as to *Alexander*, the statement of the bill is, that being the son-in-law of *Mrs. G.*, and participating in the arrangement by which her former lien was to be waived, and her debt further secured by a mortgage on the negroes, and finding that his large claim would be postponed for many years, “he required, and *Ghiselin* agreed, that *Alexander* should likewise have a security and indemnity upon said negroes.” The terms of this agreement do not seem to be vague or uncertain; a creditor in procuring from his debtor the security of a mortgage on his family of negroes, another creditor engaged in the arrangement, and finding mortgages given upon the land on a long credit, and a mortgage on the negroes for a still longer credit, and anticipating great delay in the payment of his debts, demands of the debtor “to give him indemnity and security on the same negroes,” and the debtor agrees to do so. It is clearly a contract to secure the last named creditor by a mortgage on the same negroes, which were previously agreed to be mortgaged to *Mrs. Ghiselin*, and of course subject to her mortgage; so far then as this statement of the agreement is concerned, it is not subject to the exception taken. But it is said another contract is alleged, and a different one, in that part of the bill which is supposed to rely on the language of the bill of sale, as the contract. In regard to that transaction it is alleged that *Alexander*, at the request of *Robert G.*, prepared the deeds, including the mortgage of *Robert G.*, to both *Mrs. G.* and *Alexander*, of his stock of negroes, which mortgage was delivered to *R. G.*, and is filed as an exhibit in the cause. Now this is either a subsequent agreement, or it is not. If it be a subsequent agree-



ment it must supersede the first, as far as they differ; and then the agreement to execute this particular mortgage must be regarded as the subsisting and only contract between the parties. If it be so, and such is the correct view of the case, there is an end to the objection now discussed. Whatever reason may be urged against it, most clearly the want of sufficient certainty cannot.

If however, it be not regarded as a subsequent contract, then the effort to enlarge by the mortgage, the terms of the original agreement, will not render it more vague or uncertain than it was originally.

The question of consideration, so far as regards the agreement with *Alexander*, was alluded to in the argument, but chiefly in reference to any supposed contract, based upon the consideration of forbearance. Whether an existing creditor demanding specific security for his debt, and obtaining the promise of the debtor to comply, is to be considered in a court of equity, as favorably as a creditor, who at the moment of becoming a creditor, obtains a pledge for a specific security has been much agitated, and the decisions have not been uniform on the subject.

In *Burn & Burn*, 3 *Ves.* 573, a case is cited as having been decided both by the then Chancellor, *Lord Rosslyn*, and his predecessor, *Lord Thurlow*, in which the facts were these:—*Sir Simeon Stuart* being pressed by a creditor in his neighborhood, engaged by letter to “make him a mortgage upon some part of his *Hampshire* estates,” and afterwards made a conveyance to trustees, for the payment of all his debts, and died leaving both general and judgment creditors, and without having executed the mortgage. It was held that the agreement to mortgage was to be regarded in equity as a mortgage from the date of the letter, and the debt was classed before the judgment creditors. The authority of that decision is sanctioned by sound reason. If a general creditor who has indulged his debtor on the faith of his ability to pay all his debts, shall commence the race of vigilance, as soon as the prospect of declining ability shall disclose the probable prudence

of a specific security, and by pressing his debtor does all he can to obtain a lien on a particular portion of his debtor's effects, how will justice or equity be violated by compelling the debtor to execute his agreement, if by accident or from unwillingness he has failed to comply with it, more than in the case of a party who relies on a similar agreement, and advances a consideration on the plighted faith of the other contracting party?

The existence of a debt is at law a consideration for an express promise, equivalent to the advance of an equal amount for the transfer of property, and certainly ought to be a sufficient basis in equity on which to rest an agreement, fair in all other respects, and will sustain an agreement by a debtor to give a specific lien to a creditor.

The late case of *Burn vs. Carvalho*, 4 Myl. & Craig, 690, fully confirms this doctrine. There the debtor having property in the hands of his agent abroad, agreed with his creditor to apply such property, or a sufficient part of it, to the discharge of his liability, and sent directions to his agent for that purpose, but became bankrupt before his instructions had or could have reached the hands of the agent.

The assignees of the bankrupt in an action of trover, recovered the goods which had been delivered subsequently to the commission, issued against the bankrupt. Yet the Vice Chancellor, and subsequently on appeal, Lord Chancellor *Cottenham* held the agreement to give the lien, and it was enforced against the creditors claiming under the commission.

It is by one of the solicitors particularly urged upon the court that the lien cannot in this case be made out against *Robert Ghiselin*, and hence he concludes it cannot possibly be enforced against the creditors. It is to be remembered that the case is now before the court on a motion to dissolve the injunction on the bill and the answers; that the answers are to be taken as true, so far as they affect the interests of the defendants respectively making them, and so far as they are responsive to the bill, and the statements of the bill are to be received as true so far as they are not denied.

It has been shown that the bill alleges an agreement sufficient to entitle the appellant to the aid of the court, if it be made out. It is conceded the answers of the other defendants, except *Ghiselin*, do not deny the agreement—they profess to know nothing on the subject, and rely on their legal and equitable rights.

The answer of *Ghiselin* in so many terms, admits “that the complainant *Alexander*, proposed, and he agreed to give him also a lien on his negroes as security for his debt,” and also “that the various papers set forth in the bill, (amongst which, be it remembered, is the mortgage to *Mrs. Ghiselin* and *Alexander*) were prepared by said *Alexander*, at his (*R. Ghiselin’s*) request;” he alleges however, that the mortgage was to be a security for the debt, after the \$15,000 should be raised and received as contemplated, and denies that he ever agreed to give such mortgage to the “prejudice of the *then existing* judgment creditors.”

As against him, therefore, it would seem obvious, there must be an enforcement of the lien, so as not to affect judgment creditors being such at the date of the agreement—admitting what perhaps might well be doubted, that this part of the answer was strictly responsive, and *not* in avoidance. How far this restriction or qualification would, if proved, affect the case at any future stage of it, we are relieved from the necessity of considering, because the complainant *Alexander*, in person and as solicitor for *Mrs. Ghiselin*, has expressed to the court during the argument, their entire willingness to have such qualification attached to the agreement, and to claim their liens thereunder, subject to existing judgments, and allowing them a priority.

It appears therefore, that in the present position of the case, the bill being admitted by one defendant and not denied by the others, the agreement must be regarded by the court as subsisting. How far its existence subject to the prior rights of judgment creditors, would have entitled the appellants to claim a continuance of the injunction, is a question not necessary to discuss, because the injunction was proper on the other

ground, that is to say, the right of the trustee to administer the fund.

The only remaining objection is that an injunction bond was not filed. It is certainly proper as a general rule, very rarely, if ever to be departed from, that an injunction bond should be required when an application is allowed that delays the recovery or receipt of money, or which lessens or in any respect endangers any existing securities, or renders liable to loss thereby any money or profits, or property, which the adverse party is by the injunction prevented from receiving or enjoying. There should have been an injunction bond in the present instance, and on failure to file it before the injunction issued, the defendants in the court below could and should have applied by petition for an order requiring such bond to be given by a reasonable period, to be limited for that purpose, or, on default to have the injunction dissolved. Such a proceeding would still be proper, and would be directed in the court below, if the continuance of the injunction was dependent upon a question of fact or law yet to be established.

But whatever might be said, if there was any longer a doubt as to the issue of the application for an injunction, it would be an idle and perfectly useless form, and of course unnecessary now to require an injunction bond, because it is the direct result of the opinion above expressed, that the injunction, the only effect of which is to restrain the judgment creditors from proceeding to sell, must be perpetual, it being in all the answers admitted that the complainant *Alexander* is the trustee duly appointed under the insolvent law, and therefore having authority to take into his possession all the effects of the insolvent, and administer them as he must do, on the responsibility of his bond as trustee.

The case must however be remanded for the purpose of allowing further proceedings and such final decree as justice and equity shall require, upon proof to be taken in relation to the agreement alleged in the bill.



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**WILLIAM G. HARDEY AND THOMAS J. MARSHALL, surviving obligors of NATHANIEL HATTON AND JOSEPH N. BURCH, Jr. *vs.* SAMUEL COE, Administrator of ALEXANDER MUNDELL, use of J. B. BROOKE, Administrator of RICHARD PEACH.—December, 1847.**

Where it does not appear from the record, that any question was raised in the county court as to the form, or sufficiency of the pleadings, this court is not at liberty to act upon such questions.

In an action upon an injunction bond, the recitals and condition of which mentioned a judgment, the defendant pleaded general performance. The plaintiff assigned a breach, to which the defendant rejoined no such record of judgment as the plaintiff in his assignment hath alleged. This rejoinder is bad on demurrer.

When the fact of a judgment obtained is admitted in the recital and condition of a bond, the obligors are estopped from denying it in their pleadings.

But where in such a case a demurrer was not resorted to, and the plaintiff sur-rejoined there was such a record, and prayed that it might be enquired of by the court, and the defendant doth the like; this makes an issue of no such record, which is a matter of law to be tried by the court.

Where there are both issues of law and fact, it is the duty of the court to dispose first of the issue of law.

Upon the judgment of the county court, rendered upon the issue joined of *nul tiel record*, that there is such a record, this court is bound to believe that the county court made its decision by an inspection of the record.

At the trial before the jury, the plaintiff took a bill of exceptions, in which it was stated that he, to support the issue joined on the plea of *nul tiel record*, offered a record in evidence to the jury. This was objected to, but the court permitted it to be read. By the decision the defendant sustained no injury, and had no right to complain; as he by his pleading, had admitted every fact which the record could establish.

A party cannot be injured by his opponent's offering evidence, whether competent or incompetent, to prove facts admitted by the pleadings, or the truth of which the objecting party is estopped from denying, or which the court is bound under the circumstances of the cause to assume.

Upon the plea of payment of a judgment, the party must prove the payment of the whole judgment, and not a part thereof.

Where a partial payment, as a compromise, is of such a character as to bar the plaintiff's right to recover, it ought to be pleaded by way of accord and satisfaction, and not as a payment.

Where there is nothing more than a simple payment, and acceptance of a less sum of money, in satisfaction of a greater sum due, this will not sustain the plea of accord and satisfaction.

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APPEAL from *Prince George's* County Court.

This was an action of *debt*, brought on the 21st October, 1844, by the appellees against the appellants, on the bond of the appellants, sealed on the 20th July, 1833, reciting that “the above bound *N. H.* has obtained from *Prince George's* county court, as a court of equity, an injunction to stay proceedings at law on a judgment rendered against him in *P. G.* county court, in favor of the said *A. M.*, for the sum of \$864, with interest from 28th May, 1825, until paid, and costs, which said judgment now stands entered for the use of *J. B. B.*, administrator of *Richard Peach*, with condition to prosecute the injunction with effect, and pay, &c., unless, &c.”

The defendants pleaded general performance by *N. H.*

The plaintiffs replied, that it was so proceeded on the bill in equity, mentioned in the condition of the said writing obligatory, and filed by the said *Nathaniel*, on the equity side of *Prince George's* county court, that afterwards, at a court of Chancery, held at *Annapolis*, at the March term, eighteen hundred and forty-four, to wit: on the twenty-seventh day of June, in the year last aforesaid, before the Honorable *Theodorick Bland*, Chancellor, (to which said Court of Chancery, the said cause had been removed, according to the act of Assembly, in such case made and provided,) it was by the said Court of Chancery, then and there adjudged, ordered and decreed, that the injunction issued in the said cause, to stay execution of the judgment aforesaid, of *Prince George's* county court, be discontinued and dissolved; and that the said bill of complaint be dismissed. And the said plaintiff avers, that no further proceedings have been had in the premises, but the same decree remains in full force, and not reversed, as by the record thereof, in the said court remaining, fully appears; and the said plaintiff says, that the said sums of money, mentioned in the condition of the said writing obligatory, nor any part thereof, has been paid to the said *Alexander Mundell*, or his administrator, nor to the said *Richard Peach*, or to his said administrator, either in the life-time of the said *Nathaniel Hatton*, or since his death, by his said administratrix, and this the said plaintiff is ready to verify; wherefore, &c.

The said defendants rejoined :

1st. That there is no such record of said judgment in the said court, as the said plaintiff, in his said replication, hath alleged ; and this they are ready to verify, &c.

2nd. That after the said recovery of the said debt and damages, and before the issuing of the original writ in this cause, to wit : on the            day of            at the county aforesaid, they, the said defendants, paid to the said plaintiff, the said debt and damages, in form aforesaid recovered ; and this they are also ready to verify, &c.

The plaintiff surrejoined, that there is such record of the judgment aforesaid, and recovery of the debt, damages, costs and charges aforesaid, as he above doth suppose, as appears of record in the said term in *Prince George's* county court ; and this, he prays, may be enquired of by the record ; and the said defendants do the like, &c.

And as to the second rejoinder, the plaintiff traversed the same on which issue was joined, &c.

Upon which, the record aforesaid, being seen and inspected by the court here, it sufficiently appears to the same court, that there is such a record of recovery against the said *Nathaniel Hatton*, at the suit of the said plaintiff, as the said plaintiff hath above in that behalf alleged. Therefore, &c.

A jury was then sworn to try the issue upon the 2nd rejoinder, and found a verdict for the plaintiff. \$1028 35.

EXCEPTION. At the trial of this cause, the plaintiff, to support the issue joined on the plea of *nul tiel record*, offered in evidence to the jury, the following record of proceedings, in *Prince George's* county court, as a court of equity, subsequently removed to the Court of Chancery, which is as follows, to wit :

This was the record of the equity cause, to which the bond referred, and which was dismissed by the Chancellor at the final hearing, under the following agreement :

It is hereby agreed, that the decree of the Chancellor, passed in this cause on the 29th March, 1844, may be struck out, and a new decree passed, dissolving the injunction, and dismissing the

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bill, each party paying his own costs. And it is further agreed, that the defendant, *John B. Brooke*, administrator of *Peach*, shall then proceed to collect the money due on the judgment in the proceedings mentioned; and that when collected, it shall be applied as follows:—the sum of five hundred dollars to be retained by said *Brooke*, adm'r as aforesaid: three hundred and twenty-five dollars to *Joseph Hatton*, and the residue to *Eleanor B. Hatton*, as assignee of *Anne Hawkins*—the said *Eleanor B. Hatton*, as adm'x of *Nathaniel Hatton*, not being entitled to any part thereof. 26th June, 1844."

The defendants, by their attorney, objected to the admissibility of the decree of the Chancellor, passed on the 27th June, 1844, as contained in said record, and the whole of said record, to support the issue joined on the said plea of *nul tiel record*; but the court overruled the objection, and permitted the said decree and record to be read, and gave judgment for the plaintiff on the issue of *nul tiel record*.

To which opinion of the court the defendant excepted.

The defendants then to support the issue on their part joined on the plea of payment, proved to the jury, that on the 29th March, 1844, the sum of five hundred dollars was paid by the defendants to the beneficial plaintiff, *John B. Brooke*, as the adm'r of *Richard Peach*, on a compromise and agreement made between the said *Brooke*, and the other parties to the said proceedings in Chancery, dated 29th March, 1844, and contained in said record, which sum was in full of the amount due to the said beneficial plaintiff, as the adm'r of said *Peach*, of the original judgment referred to in the defendant's injunction bond, sued on in the present action; but that the said sum was not in fact the whole amount due on the said judgment.

Whereupon, the defendants prayed the court to instruct the jury, that if they believe from the evidence, that the said sum of five hundred dollars was paid to the said beneficial plaintiff, prior to the institution of this suit, and was accepted by him in full of the interest, in the judgment against *Nathaniel Hatton*, referred to in the condition of the bond sued on in this action; that then they must find a verdict for the defendants, on the



said issue joined on the plea of payment; but the court (KEY and CRAIN, A. J.,) refused to give the said prayer. To which opinion of the court, and to their refusal to grant the defendants' prayer, the defendants excepted, and prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By T. F. BOWIE for the appellants, and

By W. H. TUCK for the appellees.

DORSEY, J., delivered the opinion of this court.

Although some discussion has taken place as to the form or sufficiency of the pleadings in this cause, we are at liberty to act upon no such question; as it does not appear from the record that any such question was raised or decided in the court below.

The judgment, mentioned in the recital and condition of the injunction bond, on which the present action was instituted, is a judgment rendered against *Nathaniel Hatton*, in favor of *Alexander Mundell*, in *Prince George's* county court. The defendants in their plea having pleaded general performance, the plaintiff, in his replication charges, as the breach of said bond, the dissolution of the injunction, and dismissal of the bill on which it issued, and the non-payment of the judgment of *Prince George's* county court, and mentioned in the condition of the said writing obligatory; (that is, the bond on which this action is instituted.) The defendants in their rejoinder say, "that there is no such record of said judgment in the said court, as the said plaintiff, in his said replication hath alleged." Had the pleadings been conducted in proper form, this rejoinder would have been bad on demurrer. The fact of the judgment being admitted in the recital and condition of the bond, the obligors were estopped from denying that fact in their pleadings. But the proper form of pleading to admit of such a demurrer, having been departed from, the plaintiff by his surrejoinder says, that there is such record of the judgment

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aforesaid in *Prince George's* county court; "and this he prays may be enquired of by the court; and the defendant doth the like," &c., and thus was the issue joined of *nul tiel* record. An issue of fact upon the rejoinder of payment was also joined. There were then two, and only two issues, in the cause; the one of law to be tried by the court; and the other of fact to be tried by the jury. The court, as was its duty to have done, first disposed of the issue at law; as to the alleged judgment in *Prince George's* county court, and the mode in which they did so, is thus stated in the record before us: "upon which the record aforesaid, (that is, the record of the judgment in *Prince George's* county court, mentioned in the pleadings in the cause, and to which the inquiry of the court had been prayed,) being seen and inspected by the court, it sufficiently appears to the same court, that there is such a record of recovery against the said *Nathaniel Hatton*, at the suit of the said plaintiff, as the said plaintiff hath above in that behalf alleged." By this proceeding of the court, the plea of *nul tiel* record was definitively disposed of; and we are bound to believe, as stated in the record before us, that the court made its decision by the inspection of the record of the judgment in *Prince George's* county court. The record before us then proceeds, as follows: "whereupon, for trying the issue aforesaid above joined, between the parties aforesaid, (which issue was the fact of payment of the judgment,) it is ordered by the court," &c. in the usual form, that a jury be empannelled and sworn, which was accordingly done, and the verdict, as to the payment, was found against the defendants.

At the trial before the jury, the plaintiff took a bill of exceptions, in which it is stated, that "the plaintiff to support the issue joined on the plea of *nul tiel* record, offered in evidence to the jury, the following record of proceedings in *Prince George's* county court, as a court of equity, subsequently removed to the Court of Chancery," being a transcript of the proceedings in equity, in which the injunction bond was given, on which the present action was instituted. Why this evidence was offered by the plaintiff to the jury upon the plea

of *nul tiel* record, it is difficult to form a conjecture, unless he believed that the issue on the plea of *nul tiel* record was not exclusively confined to the alleged judgment in *Prince George's* county court. But that upon the plea of *nul tiel* record, there was another issue which denied the existence of the equity proceedings stated in the replication; and which latter issue was to be tried by the jury, and not by the court. To the admissibility of those proceedings in equity, to support the issue joined on the said plea of *nul tiel* record, the defendants objected; but the court overruled the objection, and permitted the said decree and record to be read, and gave judgment for the plaintiff on the issue of *nul tiel* record. Whether the court in overruling the defendants' objection to the record, permitted it to be read to the jury, as from the language of the exception, is not improbable, and then reiterated the decision it had theretofore made on this plea of *nul tiel* record, or assuming to itself the decision of this newly alleged issue, examined and inspected it, and pronounced its decision thereon, by no means conclusively appears. Nor is it material for this court to determine. By the decision of the court below, made in due form of law, and at the proper time, before the jury were sworn, the only issue joined on the plea of *nul tiel record* was adjudicated. And by the court's decision on the transcript offered in evidence, the defendants sustained no injury, and consequently had no right to complain. By the pleadings of the defendants, they had admitted all the facts alleged in the plaintiff's replication, except the judgment in *Prince George's* county court, and its non-payment. The allegations, as to the proceedings in equity, the defendants admitted to be true. How then could the defendants be injured by the plaintiffs offering evidence, whether competent or incompetent, to prove facts which under the pleadings in the cause, they admitted to be true, and the truth of which the court were bound to assume, whether established or not, by the proof gratuitously offered by the plaintiff? The court's admission of the testimony, objected to by the defendants, therefore, whether right or wrong, forms no ground for the reversal of its judgment.

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“The defendants, to support the issue on their part joined on the plea of payment, proved to the jury, that on the 29th of March, 1844, the sum of five hundred dollars was paid by the defendants to the beneficial plaintiff, *John B. Brooke*, as the administrator of *Richard Peach*, on a compromise and agreement made between the said *Brooke* and the other parties to the said proceedings in Chancery, dated 29th March, 1844, and contained in said record, which sum was in full of the amount due to the said beneficial plaintiff, as the administrator of said *Peach*, of the original judgment referred to in the defendants’ injunction bond, sued on in the present action; but that the said sum was not in fact the whole amount due on the said judgment.” “Whereupon, the defendants prayed the court to instruct the jury, that if they believe from the evidence, that the sum of five hundred dollars was paid to the said beneficial plaintiff, prior to the institution of this suit, was accepted by him in full of his interest, in the judgment against *Nathaniel Hatton*, referred to in the condition of the bond sued on in this action, that then they must find a verdict for the defendants, on the said issue joined on the plea of payment; but the court refused to give the said prayer;” and this refusal forms the ground of the defendants’ second exception; and for which they claim the reversal of the judgment of the court below. The defendants’ plea of payment did not allege a payment of the judgment in part, but a payment of the entire judgment. To have entitled them to a verdict, they must have proved payment of the whole judgment, and not of a part thereof. Their proof offered showed but a partial payment of the judgment; and admitted that it was not of the whole amount due thereon. The court, therefore, on the pleadings before it, could not have done otherwise than refuse the defendants’ prayer.

If the partial payment, stated in the testimony as a compromise, had been of such a character as to bar the plaintiffs’ right to recover, it ought to have been relied on by the defendants, by way of a plea of accord and satisfaction—not as a payment of the entire judgment. But if the plea of accord



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and satisfaction had been interposed, it would have been of no avail to the defendants; the testimony in the cause showing the transaction to have been destitute of those requisitions, which are indispensable to the successful interposition of such a plea. It is apparent from the testimony, that the defence asserted, was nothing more than the simple payment and acceptance of a less sum of money in satisfaction of a greater sum due; and therefore could not sustain a plea of accord and satisfaction.

The judgment of the county court should be affirmed.

JUDGMENT AFFIRMED.

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GEORGE H. SMITH AND ELOISE HIS WIFE vs. MARTHA  
YOUNG.—*December, 1847.*

Under the act of 1798, ch. 101, sub ch. 15, sec. 17, either party may apply to the Orphans court for issues to be sent to the county court, if there be any matters properly in issue between the parties to a contest upon plenary proceedings.

Whether there are any such matters in issue, the court will determine as a question of law.

No person by vows of any description, can exempt himself from any of the duties which the State may require of him, nor forfeit any of the rights of citizens, which, but for the vows, would have belonged to him.

Upon an application for letters of administration, the Orphans court can only regard the party making them as any other citizen, notwithstanding such party may have voluntarily taken upon himself vows of seclusion from the world.

The party applying for administration, and not the Orphans court, is to judge whether he can, consistently with vows he may have taken, discharge the duties of administrator.

The law requires of all who administer upon the estate of a deceased person, bond with ample security for the faithful performance of the duties they undertake.

Of the religious or other engagements of such parties, the Orphans court need not be informed, and issues designed only to give such information, ought not to be framed and sent to a county court.

By the act of 1798, ch. 101, sub ch. 5, sec. 19, it is declared, that in the grant of letters of administration "a *feme sole* shall be preferred to a married woman

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in equal degree.” This rule is applicable to the children of the intestate, and is not to be connected exclusively with those sections of that sub chapter, which relate to the grant of letters to collaterals.

In the cases spoken of in the 10th and 23d sections of sub ch. 5, 1798, ch. 101, administration is to be granted in the discretion of the Orphans court.

The 10th sec. relates to cases where there is a widow and a child.

An intestate left no widow, a son, minor children, and a married and an unmarried daughter. The son was disqualified; and as between the daughters, the unmarried is to be preferred to the married daughter, in the grant of letters of administration upon the father's estate.

### APPEAL from the Orphans Court of *Prince George's* County.

The appellants on the 8th May, 1847, filed their petition, alleging that *Notley Young*, late of *Prince George's* county, deceased, died sometime in or about the month of July, 1846, intestate, leaving your petitioner, *Eloise, Martha Young, Benjamin F. Young*, and two minor children, to wit, *Clement* and *Julia*, his only children and heirs-at-law. That a certain paper purporting to be the last will and testament of said *Notley*, was offered for probat in this court, as and for the last will and testament of said *Notley*; but a *caveat* being filed by your petitioners, against the said pretended last will, this Honorable court directed issues for trying the validity of said pretended will, to be sent to the county court of *Prince George's* county; and at the April term of said court, just passed, the said *caveat* was in all things sustained, and the said issues were decided by the court and jury, against the validity of said will, all of which will more fully appear by reference to the record of said *caveat* and issues, now in this court remaining upon *procedendo* from said county court; that in consequence of the setting aside of said pretended will, it will become necessary for this court to grant letters of administration on the personal estate of the said *Notley Young*, to some person or persons who are entitled and qualified by law to administer thereon; that the said *Benjamin F. Young* is the only male child of the said *Notley*, of full age, who by law is entitled to the said administration; but in reference to the said *Benjamin*, your petitioners aver that he is disqualified, from total blindness and deafness, and from physical infirmity, from discharging the

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duties of said office; and upon being properly summoned before this court, your petitioners aver that the said *Benjamin* will renounce his right to said administration; that they have been informed that the said *Martha*, who is the only unmarried female child of said *Notley* of full age, claims the right of administration over your petitioner *Eloise*, and intends making her application to this court for letters of administration on the said *Notley's* personal estate; but in reference to said *Martha*, your petitioners aver and charge that she is now, and has been for many years, a nun in the convent at *Georgetown*, in the *District of Columbia*, having taken the black veil, and an oath or vow of total and perpetual seclusion from the world, and renounced all participation in the secular pursuits of the same. That by reason of said vow and oath, she has disqualified herself from acting as such administratrix; and that she is now residing permanently in a foreign jurisdiction, and an inmate for life of a nunnery, and cannot be subjected or made amenable by any process known to the law, to the jurisdiction of this court, or made to obey the process thereof. That the said *Martha* has renounced her rights to administer on the said estate, if she ever had any, by reason of her said monastic vows; and is now estopped by her own acts from claiming such right, if any she ever had. Your petitioners therefore claim that administration rightfully belongs to your petitioner *Eloise*, who is of full age and in all respects able and qualified to administer on the estate of her said father. *Prayer* for summons and grant of letters, &c.

On the 8th May, 1847, the appellee also filed a petition, praying for letters of administration on her father's estate; and on the 19th May, she appeared in court, filed her answer to the petition of the appellants, in which she admitted all the allegations of the petitioners, which did not relate to herself, and in relation to herself she alleged that for several years past she has been, and now is one of the "*Sisters of the Visitation*," an association of ladies for the objects of religion, education and charity; and who were incorporated by an act of Congress of the United States, as far back as the year 1828; and that as one

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of the said sisterhood, she has, since becoming a member thereof, always resided at the *Convent of the Visitation*, near *Georgetown*, in the *District of Columbia*, and beyond the limits of the *State of Maryland*; and that according to the rules and regulations of the sisterhood, she has in uniting herself with the same, become a nun, and has taken the black veil; and she admits also, that it was her engagement, and is her present purpose to continue permanently during her life, as a member of the said institution, and as such, to remain an inmate of said convent, unless she shall hereafter be called on to remove to some other establishment of the sisterhood, of which there are several, as well in, as out of the *State of Maryland*. But respondent further saith and averreth, that the petitioners have greatly erred in their statement of the scope, character, and obligation of the engagement that this respondent has entered into as a nun and member of the association afore-said: and she saith, that as such nun and member, she has not been required to take, nor has she taken any oath whatever; that the only vow or engagement that she has entered into, has been of a purely religious character, and is well understood by herself and the sisterhood, to impose no legal restraint or obligation of any kind; so that she may, if so disposed, at any time sever her connection with the sisterhood, and withdraw entirely and permanently from the convent, without any hindrance or restraint whatever; and of this course, there have been repeated instances on the part of other sisters entering into precisely the like vows or engagements with those of this respondent. And this respondent saith, that she hath not taken, nor do the rules and regulations of the association impose on any member any vow, oath or engagement of any kind, of total and perpetual seclusion from the world: for she saith, that although the avocations of the sisters for the most part confine them within the limits of their respective conventional or other residences, yet instances have been, and are of frequent occurrence, in which, in entire consistency with their vows or engagements, they go beyond those limits into the world, on the business of the institution, or on their own private affairs,



both in and out of courts; and in illustration of this, she saith that if letters of administration on the estate of the deceased shall be awarded to her, she will be prepared to attend personally before this Honorable court, for the purposes of qualification, settlement of accounts, and the like; and to perform all other essential duties incident to her office as administratrix, and requiring her personal attention. All which she will do without the slightest infringement of any vow or engagement of any kind, entered into by her, as a nun or sister of the *Visitation*. And she further saith, that it is equally untrue, that as a nun or otherwise, she has by any vow or engagement of any kind, renounced all participation in the secular pursuits of the world; for she saith, one chief object of the association is education; and they connect with it an active charity, extended towards those who have not the means of defraying the expenses of their education. And she saith in illustration of this, that the association have always conducted at their establishment near *Georgetown*, and now do, a flourishing boarding and day school, for pay scholars of different religious denominations; the labours of which, devolving exclusively on the nuns, may be judged of by the fact, that the number of boarders alone at present in the school, exceeds ninety, and has only lately been considerably above one hundred; and their charity school also embraces a large number, without distinction of religious faith, many of whom are fed and clothed, as well as educated. It will be readily seen, that the conduct of such schools, and the supply of the varied wants of the pupils, necessarily involve an extensive participation in the secular pursuits of the world; and respondent therefore forbears, as unnecessary, a further enumeration of secular pursuits incident to the management, preservation, and disposal of their property. And respondent in conclusion, denies that she renounced or forfeited by any vows, her right of administration without this, &c. &c.

The petitioners then prayed that the court would direct an issue or issues to be made up and sent to some court of law, most convenient for trying the same, in pursuance of the

provisions of the act of Assembly in such case made and provided.

The following issues were tendered to the court by the petitioners :

1st. Whether the said *Martha Young* is, or is not, a resident of the State of *Maryland*.

2d. Whether the said *Martha Young* is, or is not, a professed nun in the monastery at *Georgetown*, in the *District of Columbia*, and an inmate thereof for the term of her natural life.

3d. Whether the said *Martha Young* has, or has not, taken a vow or engagement of perpetual seclusion from the world, and of renunciation of all participation in the secular pursuits of the world, and thereby become incapable of acting as administratrix on the personal estate of *Notley Young*, deceased.

4th. Whether the said *Martha Young* has, or has not, renounced her right of administration on the personal estate of *Notley Young*, deceased.

5th. Whether the said *Martha Young* is, or is not, estopped from all claim or right to administration on the said personal estate of *Notley Young*, deceased.

6th. Whether the said *Martha Young* is, or is not, capable of performing in person, the duties of administratrix of said *Notley Young*'s personal estate, without the consent of the *Archbishop of Baltimore*, or some other authority in the *Roman Catholic Church*.

7th. Whether the said *Martha Young* is entitled to administration on the personal estate of said *Notley Young*, as against her sister, *Eloise Smith*, the wife of *George H. Smith*.

8. Whether the said *Benjamin F. Young* is physically or otherwise incapable of administering on the said *Notley Young*'s personal estate.

In connexion with the foregoing petition, the parties by their counsel, filed an agreement in writing of the tenor and words following, to wit :

“It is admitted by *George Henry Smith and wife*, and *Martha Young*, that *Benjamin F. Young* is incapable of performing the office of administrator on the estate of *Notley Young*, de-

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ceased, for the reasons stated in the petition. And they also agree, that the Orphans court may consider the application of said *Smith and wife*, for issues to be sent to a court of law, and for letters of administration on said *Notley Young's* estate, by them or by *Martha Young*, in the same manner and to the same extent, as if his incompetency were judicially established, without prejudice to the rights of said *B. F. Young*, and subject to the right of either party to appeal."

On the 25th May, 1847, the Orphans court, DUCKETT, C. J., MARSHALL and HILL, A. J., overruled the prayer for issues to a court of law, upon the ground that some of them were immaterial; others related to questions of law, and to facts admitted by the petition and answer, and decreed that *Martha Young* was entitled to letters of administration upon her father's estate. The petitioners appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By BOWIE and TUCK for the appellants, and

By SEMMES and BRENT for the appellee.

MAGRUDER, J., delivered the opinion of this court.

It appears in this case, that the late *Notley Young* of *Prince George's* county, died in July, 1846, intestate, and leaving no widow. Besides two infant children he left a son, *Benjamin*, the appellant, *Eloise*, who had married the other appellant, and the appellee. The appellants by their petition applied to the Orphans court of *Prince George's* county, for letters of administration to be granted to the appellant *Eloise*, or to both the petitioners, and to the exclusion of the appellee. This claim is upon the ground that the latter "is, and has been for many years a nun in the convent at *Georgetown*, in the *District of Columbia*, a foreign jurisdiction; having taken the black veil, and an oath or vow of total and perpetual seclusion from the world, and renounced all participation in the secular pursuits of the same." By reason of this, it is alleged that she is disqualified from acting as administratrix.

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Pending this petition, the petitioners applied for issues to be sent to a county court. This application was rejected, and the above petition of the appellants was dismissed; letters of administration it seems, were ordered to be granted to the appellee. But of this the appellants are not the persons to complain, if they have no title to the administration. It is unnecessary therefore to notice anything which is said of *Benjamin*, the son of the intestate.

With respect to the application for issues to be sent to a county court, the act of Assembly authorizes either party to apply for them, if there be any matters properly in issue between the parties; the question in this case is, whether there are any such matters in issue?

It is the opinion of this court, that the court below had no power to refuse letters of administration to the appellee, for the reasons suggested by the appellants in their petition. Neither by the vows spoken of, nor by vows of any description, can the parties making them, exempt themselves from any of the duties which the State might have required of them, or forfeit any of the rights which would have belonged to them as citizens *but* for the vows. Every thing stated in the petition by the appellants may be true, and yet the appellee does not subject herself to any pain, penalty, or disability, although it could be proved, that by her application for letters of administration, the appellee had violated the ordinances, and subjected herself to the discipline of the Church, of which she is a member; still in the Orphans court, and upon this application, she can only be regarded as an unmarried daughter of the intestate.

It has been argued, that although the law may not in express words deny to the appellee letters of administration on this estate, yet the vows which she has taken render her incapable of discharging the duties of administratrix.

The answer to this is that the appellee herself, and not the court, is to judge whether she can consistently with her vows, discharge those duties. The law requires of all who administer upon the estate of a deceased person, bond with ample security for the faithful performance of the duties which they



undertake. Of their other engagements, religious, or otherwise, into which they may have previously entered, the court which is to grant the letters of administration, need not to be informed, and issues designed only to give such information, ought not to be framed and sent to a county court.

The counsel for the appellants have also insisted that although the appellee may not by her religious vows, have disqualified herself as an administratrix, yet our act of Assembly does not say that she shall be preferred to her married sister. If not entitled to claim to the exclusion of her sister, is the claim of the appellant well founded to be associated with her in the administration upon their father's estate? This depends upon the act of 1798, ch. 101, sub chap. 5. The 19th section of this sub chapter does say, "a *feme sole* shall be preferred to a married woman in equal degree." But this it is said, ought not to be applied to *children* of the intestate; it should be connected exclusively with those sections which relate to the grant of letters to collaterals. No reason for this is perceived; this sub chapter prescribes the rules by which the Orphans court is to be governed in granting letters of administration, whether to lineals, or collaterals, relations in the ascending or descending line, males or females, females married, or unmarried, &c., of course applying to each case the rules which are applicable to it. There can be no reason for saying that a rule like this is to be observed in the case of married and unmarried sisters, but it is to be disregarded when the persons claiming the letters are the daughters of the deceased, and certainly there are no words in the 19th section which will connect it exclusively with those sections which entitle collateral relations to the administration. If the appellants could claim in virtue of the 10th section, then it would seem that in order to associate the husband with the wife, as authorized by the 20th section, the latter must not be a child, but a collateral relation of the intestate. Only in the cases spoken of in the 10th and 23rd sections, is administration to be granted "at the discretion of the court." The claim in this case of the married daughter to be united with her unmarried sister in the administration, is founded on the 10th section,

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and can rest on none other in the law. But that section is confined to cases in which there is a widow, as well as a child or children, and of course does not embrace this case, in which there is no widow to be preferred at the discretion of the court to any of the children.

There is then no error in the refusal by the court below to send issues in this case to a county court, there being no matters properly in issue; and this case is like any other in which the controversy for administration upon an intestate's estate is between two of his daughters, one of them married, and the other unmarried. The latter is to be preferred to the former.

ORDER AFFIRMED.

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WILLIAM G. PENN AND JOHN PENN *vs.* ROBERT ISHERWOOD.—*December, 1847.*

After a sale of land made by a sheriff, certified in his return to a writ of *vendi*, objected to in the county court upon a motion for a writ of *hab. fac. pos.* to put the purchaser into possession granted, and affirmed upon appeal, the legality of the sale in that cause is no longer an open question.

Since the act of 1831, ch. 141, after the term of office of the sheriff who made a sale under a *fi. fa.* or *vendi*, shall have terminated, the writ of *hab. fac. pos.* may be issued to any succeeding sheriff, coroner, or elisor, provided the other provisions of the law are complied with.

A *venditioni exponas* is ordinarily issued to the sheriff who levied the *fieri facias*. He has a qualified property by virtue of the levy.

Where a writ of *hab. fac. pos.* strictly pursues the return of the sheriff's levy and sale under a writ of *fi. fa.*, and the return to the writ of possession certifies the delivery of the land described in that process, it cannot be objected that the latter writ commands the delivery of more land than was sold.

A judge of this court, satisfied by the oath of a party entitled to a writ of possession, that the sheriff of the county could not with safety be trusted to execute such writ, may order the clerk to issue the writ to an elisor named and appointed by such judge.

The acts of 1794, ch. 54, sec. 5, and 1843, ch. 270, require applications for the appointment of elisors to be supported by proof which will satisfy the judge to whom application may be made, that the sheriff cannot be safely trusted with the execution of the writ; those acts did not design that any matter of right should be decided upon such application.

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Language of a character similar to that in the acts of 1794, ch. 54, sec. 5, and 1843, ch. 271, sec. 1, is used in the act of 1773, ch. 7, sec. 7, in relation to the obtention of commissions to take proof, and from that period the construction of such words has been settled.

It is the practice in all the county courts of the State to order commissions to take proof to issue upon the affidavit of parties, where no other objection is made than the insufficiency of the affidavit of the party himself for such a purpose.

In support of motions to quash returns to writs of possession, and show that more land was delivered than authorized by the writ, the court will grant leave to take proof by affidavit on notice, and make surveys.

### APPEAL from *Montgomery County Court*.

On the 22d November, 1824, *John Brewer* sued out a writ of *fieri facias* directed to *Henry Harding*, sheriff of *Montgomery* county, upon the judgment rendered against the appellants and *Greenbury Penn*. That writ, on the 19th February, 1825, was levied upon,

“All the right, title, claim and interest, both at law and in equity, of, in and to the following tracts of land, viz :

“A tract of land called *The Addition to Ray’s Adventure*, with all the improvements thereon, containing 100 acres more or less.

“A tract of land called *Owens’ Resurvey*.

“A tract of land called *The Resurvey on Moore’s Delight*.”

On the back of the inventory and appraisement which showed the levy, the return of the sheriff being “laid as per schedule annexed,” was the following endorsement: “Return amended 7th March, 1843. *H’y Harding*, late sheriff.”

The schedules with this amended return showed a levy upon,

“All the right, title, interest and estate of *W. G. Penn*, both at law and in equity, of a tract of land called *Owens’ Resurvey*, containing  $99\frac{1}{4}$  acres more or less.

“A tract of land called *Owens’ Resurvey*, and a tract called *The Resurvey on Moore’s Delight*, containing  $136\frac{1}{4}$  acres more or less.”

*John Brewer* having died; on the 6th December, 1842, *Nicholas Brewer*, his administrator, sued out a writ of *vendi exponas*, directed *Henry Harding, Esq.*, which recited a return of the said sheriff, that he had levied a *fieri facias* upon all

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the right, title, &c. of *W. G. P.* to the following tracts of land, viz :

“A tract of land called the *Addition to Ray's Adventure*, containing 100 acres more or less.

“A tract called *Owens' Resurvey*.

“A tract called *The Resurvey on Moore's Delight*, formerly conveyed by *Charles Penn, Senior*, to *Charles Penn, Junior*, and *William Penn*, for 248½ acres more or less, which remain on hand for want of buyers, and commanding the said sheriff to sell the same,” &c.

The sheriff's return at March term, 1843, to the writ of *vendi*. recited that he had levied the *fi. fa.* according to the recitals of the *vendi*. and certified a sale of the lands *as therein before set forth*, to *Robert Isherwood* for \$1800, which sum the said *R. I.* had paid to him.

At March term, 1843, the defendants objected to the sheriff's sale and return :

1. Because an appeal from the judgment on which the execution issued was then depending.

2. The sheriff did not give due notice of the time, place, manner, cause and terms of sale mentioned in his return, by advertisement according to law.

3. Because the sale was not fair and valid.

4. Because the land was sold for a sum greatly less than its value, in consequence of the insufficiency of the advertisement.

These objections were overruled by the county court at November term, 1843; and on the 25th January, 1844, the purchaser, the appellee, filed in the office of the clerk of the county court, a demand of possession of the land according to the description in the *vendi. exponas*, supported by the affidavit of *W. G. Darby*, that the said *R. I.* had demanded the same of *W. G. Penn, Caleb R., John and Greenbury Penn*, that *William* and *Caleb* peremptorily refused to give possession, that the parties above named were then in possession.

The county court on motion, then ordered a rule to be laid on *W. G., Caleb R., John and Greenbury Penn*, to show cause in the first four days of March term, 1844, why a writ of *hab.*



*fac. pos.* should not issue to deliver the lands to *R. I.*, the purchaser, as set forth in the sheriff's return of sale to him, provided a copy be served, &c. at least twenty days before the first Monday of *March* aforesaid. The service of the rule was admitted.

*Caleb R. Penn* showed cause :

1. Because he was not a debtor or defendant in the cause in which the said rule was passed, and does not hold under the said debtor or defendants by title subsequent to the date of the judgment on which the *fi. fa.* issued.

2. Because the said *Caleb* has been in full and uninterrupted possession of the lands now held by him since the year 1812, and has had a full legal and equitable title since the 7th July, 1820.

3. Because *Isherwood* before his pretended purchase, had full notice of the possession and title of the said *Caleb*.

4. Because the affidavit of *Robert Isherwood* does not conform to the act of 1825, ch. 103, and the rule of court in relation to writs of *hab. fac. pos.*

In support of these reasons, the said *Caleb* exhibited a deed from *John Brewer*, trustee, to *Caleb R.* and *Ann Penn* for a part of a tract called *Owens' Resurvey*, and a part of a tract called *The Resurvey on Moore's Delight*, containing 68½ acres, and certificate by the sheriff of notice given before the sale, and to the bidders at the sale.

The other defendants showed cause against the rule :

1. That they have not had notice to deliver possession according to the act of Assembly.

2. That the interest of the parties in the land hath not been sold, and no return of the sale thereof hath been made.

3. That no affidavit of demand hath been made according to the act of Assembly.

4. That no demand of the lands hath been made according to the act of Assembly.

At November term, 1844, the county court ordered that the motion for the *habere facias* be overruled as to all the lands conveyed by *John Brewer* to *Caleb R. Penn* and wife, and that the writ issue for the residue of the lands sold as aforesaid.

From this judgment, *William G. Penn* and *John Penn*

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appealed to this court, and the judgment of the county court was affirmed upon argument at June term, 1846, and execution awarded.

On the 3d August, 1846, *Robert Isherwood* presented a petition to the Honorable *T. B. Dorsey*, one of the judges of the Court of Appeals for the *Western Shore*, alleging that since the affirmance of the judgment aforesaid, a writ of *hab. fac. pos.* had been issued to *W. O. Chappell*, Esq., sheriff of *Montgomery* county, but the said sheriff having informed the said *R. I.* that he is interested in the property of the said *W. G. Penn*, referred to in said writ, and in possession thereof as his trustee, has returned said writ to the hands of your petitioner, to be delivered to the clerk of the Court of Appeals; and there being on the face of the said writ an informality, the petitioner countermanded the same; that he is credibly informed and verily believes there is *no coroner* in said county, and that the sheriff of the said county cannot safely be trusted with the execution of the said writ of *hab. fac. pos.* to be issued in said cause, and therefore prays an elisor may be appointed accordingly, &c.

To this petition was appended the affidavit of *Robert Isherwood*, before a justice of the peace of *Montgomery* county, "that the matters and things in the foregoing petition stated, of his own knowledge are true, and those stated on the knowledge and information of others he believes to be true; and further, that the said sheriff of *Montgomery* county cannot safely be trusted with the execution of the said writ of *hab. fac. pos.*."

On the 5th August, 1842, the Honorable *T. B. Dorsey* nominated and appointed *H. Harding*, Esq. of *Montgomery* county, an *elisor* to whom should be directed the writ of execution to be issued by the clerk of the Court of Appeals for the *Western Shore*, on the judgment, &c.

A writ was accordingly issued on the 7th August, 1846, and *H. Harding* declined to act; upon that fact appearing to the judge by the written declaration of *Mr. Harding* endorsed on the writ, on the 24th August, he certified to the clerk of the court, the appointment of *Joseph Snyder* as *elisor*, in the

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place and stead of *H. Harding*. The writ was again issued, and *J. S.* also declined to act; this also appearing to the judge on petition, and by the endorsement of *J. S.* on the writ, on the 22d September, 1846, the judge appointed *Thomas L. F. Higgins* as elisor.

On the 28th September, 1846, a writ of possession was sued out, commanding the last named elisor “to cause the said *R. I.* to have possession of the said tracts of land, *The Addition to Ray’s Adventure*, *Owens’ Resurvey*, and *Resurvey on Moore’s Delight*, except those parts of the two last mentioned tracts conveyed by *John Brewer* to *Caleb R. Penn* and wife, returnable to December term, 1845.”

The elisor returned the writ as executed on the 10th October, 1846, describing the property delivered in its very terms.

At December term, 1846, the return term of the *hab. fac. pos.*, the appellants moved the court to quash it :

1. Because it was improvidently granted.
2. Because it was directed to an elisor without sufficient proof that the sheriff was incompetent to execute it.

And they also moved to quash the return of the same :

1. Because the return does not state that the lands as described in the writ had been delivered into the possession of the appellee, and the same were not delivered.
2. Because the said elisor actually turned the said parties out of the possession of property never sold by the sheriff, and to which the appellee never set up any claim; and it does not appear that he caused a survey to be made, or took any other steps to ascertain the tracts or parts of tracts therein mentioned.

The appellants prayed leave to take testimony on three days notice as usual, before a justice of the peace of *Montgomery* county, and to lay down by a surveyor such lands as may be necessary for the purpose of showing their rights, and the land, of the possession of which they have been deprived, and to which the appellee had no claim, and such lands as may be necessary for illustration; and that they may be reinstated in possession of the said lands, if the said writ and return shall be quashed,

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or such part thereof as the appellee may appear to have no right to the possession of.

The court granted the prayer of the appellants, subject to all just exceptions, and also the same privileges to the appellee, and required the appellant to file their proof and surveys by the 1st May, and the appellee to file his by the 1st June, 1847. Surveys were made, and a variety of affidavits taken and returned.

The motions to quash the writ of *hab. fac. pos.* and return, were argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By McLEAN and CARTER for the motion, and

By PALMER and BOWIE contra.

SPENCE, J., delivered the opinion of this court.

The legality of the sale made by the sheriff of *Montgomery* county, and certified in his return to the *renditioni* in this case, is not now an open question.

Objections were made in *Montgomery* county court to the sale, and the court after deliberation thereon passed the following order:—"The court upon due consideration of the proceedings aforesaid, with all things thereunto relating, order and adjudge that the motion for a *habere facias* be overruled, as to all the lands conveyed by *John Brewer* to *Caleb R. Penn* and wife: the court further order and adjudge that the writ of the *State of Maryland* of *habere facias possessionem*, issue for the residue of the lands sold as aforesaid." From this order of the county court, *William G. Penn* and *John Penn* appealed to the Court of Appeals, and at June term, 1846, this court affirmed the judgment of the county court.

It was insisted by the counsel of *Penn*, that the writ of *habere facias* should have been directed to *Henry Harding*, late sheriff of *Montgomery* county, who sold the land mentioned in the writ.

To this argument, the act of 1831, chap. 41, furnishes an answer, which in its first section, is as follows: "that in all



cases under the original act to which this is a supplement, it shall and may be lawful for any of the courts of this State, mentioned in said law, in case the sheriff, coroner or elisor shall die, resign, be removed from or disqualified for office, or have his authority otherwise terminated, after the sales mentioned in said law, and before the writ in the nature of a writ of *habere facias possessionem* shall have been issued and executed, to issue said writ in the nature of a writ of *habere facias possessionem*, to any succeeding sheriff, coroner or elisor, so that all the other provisions of said law are complied with and observed.”

In this case, the term of office of the sheriff who made the sale had expired, and it was to prevent the writ being directed to his successor in office, that the application was made for the appointment for an elisor. The same reason does not exist in law, for confiding the execution of a writ of *habere facias possessionem*, to the sheriff who made the sale, as does for directing a *renditioni exponas* to the sheriff who levied the *feri facias*; in the former case, no property vests in the sheriff by the sale; in the latter case the law does clothe the sheriff with a qualified property by virtue of the levy made under the *feri facias*. We therefore think there is no force in this objection.

The answer to the objection, that the writ of *habere facias possessionem* commands the elisor to deliver more land than was sold by the sheriff is, that the command of the writ pursues strictly the return of the sheriff, and the order of the Court of Appeals, and the return made by the elisor to the writ of *habere facias possessionem* certifies that he has delivered to *Isherwood*, the land named and described in the writ of *habere facias possessionem*.

It was insisted by the counsel for the motion, that the appointment of the elisor was not made according to the provisions of the acts of Assembly of 1794, ch. 54, sec. 5, and 1843, ch. 270, and therefore illegal.

The argument was that these acts require, that the judge should not be satisfied that the sheriff could not with safety be

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trusted to execute the writ by the affidavit of the party himself, but that the affidavit must be made by a disinterested person, one who would be a legal and competent witness at common law. This construction of the words "satisfied by affidavit or otherwise," would not only be a construction which might be productive of great inconvenience, but frequently deprive parties of the benefits intended by those statutes. The design of the statutes was that the judge should be satisfied of the truth of the allegation, that the sheriff could not safely be trusted, and not to decide any matter of right.

The language in the act of 1794, ch. 54, sec. 5, is "and no such appointment shall be made by any judge or justice, unless he shall be satisfied by affidavit that the sheriff or coroner of the county cannot safely be trusted with the execution thereof." The words of the act of 1843, ch. 271, sec. 1, are "in any case where the said court or justice shall be satisfied by affidavit or otherwise."

It is our opinion that the practice of the courts of the State from 1773 to this time, settles the construction of these words. The act of 1773, ch. 7, sec. 7, provides, that the justices of the provincial court or any county court, upon application made to them in court by any party or parties in or to any action or civil suit depending or shall be depending before them, and upon satisfaction being given to such court, by affidavit or otherwise, that there are material and competent witnesses in such cause, residing or living out of this province, to direct the clerk of such court to issue commission, &c. If there has been any case, where any court in *Maryland* has refused to order a commission under this act, on the affidavit of the party, or any case in which the legality of such an order has been even questioned, it has escaped our attention; and we believe it is the universal practice in all the county courts of this State, to order such commissions to issue upon the affidavit of the parties, where no other objection is made, than the insufficiency of the affidavit of the party himself for such a purpose.

THE MOTION IN THIS CASE IS OVERRULED.

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Graham vs. Fahnestock.—1847.

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**WILLIAM GRAHAM vs. JAMES F. FAHNESTOCK.**—*December, 1847.*

Where a single bill is made payable to *F.*, agent, and the declaration describes it as made to *F.*, this is not a variance.

The addition of the word agent in such case is a mere description, and is like the case of a note payable to an executor. The promise is to the agent personally.

Whether the obligee of a bill is empowered to assign it, is a question of law.

A plea which puts that question to the jury is bad on demurrer.

Where the subject of a plea is in abatement, and it is not verified by affidavit, the court will reject it upon motion.

A plea that the plaintiff is an infant, is in abatement.

**APPEAL** from *Washington County Court.*

This was an attachment commenced by the appellee on the 24th July, 1844, on the following single bill:

“One day after date, I promise to pay *Samuel Fahnestock*, agent, or order, two hundred dollars and thirty-one cents for value received, as witness my hand and seal this 1st January, 1844.  
WM. GRAHAM, (Seal.)”

Endorsed, “For value received I assign the within note to *James F. Fahnestock*.  
SAM. FAHNESTOCK, *Agent*.”

The appellant appeared to the suit, and gave bond with security to satisfy any judgment that might be recovered against him.

The plaintiff below then declared against him as in an action of debt, describing the single bill as payable to *S. F.*, and not to *S. F.*, agent, and averring an assignment in writing, corresponding with the endorsement above recited.

After *oyer* of the single bill, the defendant pleaded in bar:

1. That the said *S. F.* was not duly authorized to make and sign the said assignment in writing, of the said single bill, and the said sum of \$200 31 to the said *James*, in manner, &c.

2. That at the time of the commencement of the action, the plaintiff who declared by attorney, and not by guardian or next friend, was an infant. This plea was not verified by oath.

The plaintiff demurred generally to the first, and moved the court to reject the second plea.

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The county court sustained the demurrer and rejected the second plea, and rendered judgment for the amount of the debt and damages, &c., and the defendant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By SPENCER for the appellant, and

By PALMER for the appellee.

ARCHER, C. J., delivered the opinion of this court.

The single bill which constitutes the cause of action in this case, is drawn payable to *Samuel Fahnestock*, agent, and the declaration alleges that the single bill was made payable to him, without averring that it was made payable to him as agent. There exists no foundation for the objection urged, that there is a variance between the single bill, and the allegations of the *nar*.

The contract is expressly made with the plaintiff; the addition of the word agent is a mere description, and is like the case of a note or single bill made payable to *A. B.*, *executor*. The principle has often been decided: 8 *Con.* 60, and the cases there cited; the promise is to the agent personally: 8 *Mas.* 103. The same judgment has been pronounced in this court. *Turner & Plowden*, 2 *G. & J.* 435.

If the above positions be true, it follows that *Samuel Fahnestock* being invested with the legal right to the single bill, possessed the power of assignment; and in this case, whether he possessed the legal authority to assign to the plaintiff the single bill, was a question of law. The plea therefore of the defendant which put this question to the jury, was bad on demurrer.

The plea of the defendant which alleged the infancy of the plaintiff, was properly struck out by the court. The subject matter of the plea was in abatement, and it is not verified by affidavit, without which it could not be received. 3 *Cain's Rep.* 99, 100. 1 *Penn. Rep.* 442. *Eagle vs. Nelson*, 4 *H. & McH.* 413. 4 *Anne*, ch. 16, sec. 11.

JUDGMENT AFFIRMED.



## THOMAS GURLEY vs. ISRAEL HITESHUE.—December, 1847.

Payment of a part of an admitted debt is neither in law nor equity a good consideration for abandoning all claim to the residue. It is only a discharge *pro tanto*.

To entitle a debtor to exemption from the payment of his debt, either at law or in equity, he must prove a release or payment, or an agreement to receive some equivalent in satisfaction.

Where a creditor after an execution levied, gives a release or receives payment of his judgment, that defence would be properly made in the court of law, at the return of the execution, and no where else.

After an execution levied, the debtor paid off part of the judgment, and entered into an agreement with the plaintiff, that for the balance he would convey his interest in a lot, upon which the plaintiff agreed to discharge him. This agreement is not sufficient to arrest proceedings on the judgment.

Under such an agreement, where the debtor seeks a perpetual injunction against his creditor, his bill must be considered as one to enforce specific execution of his contract. The injunction in such case maintained, would accomplish all the purposes of specific execution.

A decree of specific execution here, would require the creditor to receive a conveyance and execute a release, and that release presented to a court of law, would prevent further proceedings on the judgment.

The leading object in every case of specific performance, is to carry into full effect, the exact object and intentions of the parties to the agreement on which its demand depends.

This is done on the ground, that where an honest and fair contract has been entered into by parties competent to engage without imposition or mal-practice on either side, no advantage should be taken by either of any subsequent change of circumstances, or of opinion which might alter or be supposed to alter, the benefits resulting to the parties respectively.

Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made the basis of a contract, the extraordinary jurisdiction of the court will not be exercised by coercing a specific performance.

Where a defendant, debtor by judgment, paid the plaintiff a part of his debt and proposed to pay the balance by the conveyance of a lot in which he had no interest, in consideration of a release to be granted him, and then seeks to procure a specific execution of the contract, it is asking the court to compel the creditor to exonerate him without consideration. If he intended to obtain a release, by nominally giving an equivalent, knowing it to be so, it would be a fraud.

A decree founded upon agreement to convey land in consideration of a release of a debt should provide as well for the transfer of the property as the execution of the release.

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APPEAL from the equity side of *Carroll* County Court.

The bill in this cause was filed on the 26th May, 1842, by the appellee, and alleged that at the September term of *Carroll* county court, 1841, *Thomas Gurley* as the sheriff of *Frederick* county, recovered against your orator and *John B. Boyle*, who were sureties for *Daniel McKenzie*, who was also made one of the defendants in said suit, but was returned by the sheriff of *Carroll* county "*non est*," a judgment for \$377 58, with interest from the 8th September, 1841, and costs; and also one other judgment against your orator and one *George Crabbs*, who were also securities of the said *Daniel McKenzie*, for \$238 70, with interest from the 9th September, 1841, and costs; that on the 28th February, 1842, *Thomas Gurley* agreed with complainant that if he would pay him the sum of \$150 00, and convey to him, the said *Thomas Gurley*, all the right, title, claim and interest of complainant, in and to a lot of ground with the buildings and improvements thereon, which had been before conveyed to your complainant and the said *Boyle* and *Crabbs* by the said *McKenzie*; that then he the said *Gurley*, would release your orator from all claim or demand by virtue of or on account of said before mentioned judgments, all which will more fully appear by reference being had to the receipt and agreement of the said *Thomas Gurley* herewith filed; that he has paid to the said *Thomas Gurley* the said sum of \$150 00, and has offered to convey to the said *Thomas Gurley*, and is now and has been at all times since the making of the said agreement been willing to convey to the said *Thomas Gurley* all his right, title, claim and interest in and to the said aforementioned lot of ground, with all the buildings and improvements thereon. And your orator further states that he has actually tendered to the said *Thomas Gurley*, a deed of conveyance, executed according to law, for all his right, title, claim and interest in and to said lot of ground and premises, which said deed of conveyance the said *Thomas Gurley* has refused and still refuses to accept; that the said *Thomas Gurley*, notwithstanding his said before mentioned agreement, did order two writs of *fieri facias* to be issued against the property

of your orator on the said aforementioned judgments, which said writs of *feri facias* were actually issued, placed in the hands of the sheriff of *Carroll* county to be executed, but which were not executed; that the said *Thomas Gurley* has ordered writs of *ven. expo.* to be issued, and the property of your orator to be sold to pay and satisfy said judgments; that the said writs were directed to be issued by the said *Thomas Gurley*, after the execution of the aforementioned receipt and agreement.

*Prayer* for a *subpœna* and injunction to the said *Thomas Gurley*, commanding him to give over all further proceedings at law against complainant, or on said judgments, or either of them, &c., and for general relief, &c.

With the bill were filed short copies of the judgments referred to in it, and the following receipt:

“*February the 28th, 1842.* Received of *Israel Hiteshue*, one hundred and fifty dollars, it being in part pay of two judgments in my favor, the one against *Daniel McKenzie, John B. Boyle* and *Israel Hiteshue*, the amount \$419 70½; the other against *Daniel McKenzie, George Crabbs* and *Israel Hiteshue*, amount \$263 75½; and for the balance due to me by the said *Hiteshue*, he doth agree to convey to me all his right, title, interest and claim of a house and lot in *Taneytown*, formerly the property of said *Daniel McKenzie*, at which time I bind myself, my heirs and assigns, to discharge and exonerate the said *Israel Hiteshue*, his heirs or assigns, from all persons claiming any money or monies in virtue of the beforementioned judgments.

THOMAS GURLEY.”

On this the court (BREWER, A. J.,) ordered an injunction.

The answer of the appellant admitted the rendition of the judgments answered in the bill, and the execution of the receipt by him. It alleged that the agreement on which the agreement was founded, and the receipt itself, were fraudulent and void, being obtained upon the false representation of *Hiteshue* to him, that the house and lot were clear of incumbrances, and that *Hiteshue* had a good title thereto, which he had not in fact. That the receipt was erroneously read to the defendant, and as

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if it contained a stipulation to convey a good title; that the house and lot are not worth the balance of the debt due on the judgments. The payment of \$150 was also admitted. The tender of a valid deed was denied. The issuing of the writs of *fi. fa.* and their levy were also admitted. That the writs of *vendi.* were ordered. The answer also alleged that the bill was defective for want of parties, the defendants in the judgments being necessary parties.

The complainant filed the general replication. The defendant upon petition, was afterwards permitted to file a supplemental answer, for the purpose of showing that no deed to the complainant for the lot in question had ever been put upon record until the 8th October, 1842, though executed on the 22d July, 1841, and that in fact it is a mortgage to secure the grantors, *Hiteshue, Boyle and Crabbs*, as securities for *McKenzie*, and is void as not recorded in due time; with the supplemental, a certified copy of the deed was filed.

A commission to take proof was then issued, and the proof as far as necessary appears in the opinion of the Appellate Court.

At April term, 1846, the county court (DORSEY, C. J., WILKINSON and BREWER, A. J.,) decreed a perpetual injunction from the defendant. T. GURLEY appealed to this court.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By PALMER for the appellant.

The appellant submits the following points for the consideration of the court:

1st. It is a legal maxim, that a release and discharge of one joint defendant in a judgment, is a release and discharge of all; therefore, a specific execution of the agreement in this case, would also release and discharge *Boyle and Crabbs*, which could not have been the intention of the appellant.

2nd. A court of equity will not decree specific performance, except in cases which, by extraordinary fairness, deserve it;



not only must the contract be fair, but it must be performed according to its true intent.

3rd. The bill in this case is addressed to the sound judicial discretion of the court, in the exercise of its extraordinary jurisdiction, and the court will exercise that discretion so as to promote the ends of justice under the peculiar circumstances of the case.

4th. A complainant coming into a court of equity, seeking a specific performance of an agreement, must *be able and offer* to do equity, before he can be entitled to the aid of this court.

5th. In this case the complainant has a complete remedy at law, and not having alleged any facts in his bill to entitle him to the aid of this court, he should be sent to a court of law for relief, if he be entitled to any relief.

6th. The facts and circumstances of the case clearly shew, that the agreement of the 28th February, 1842, was obtained by fraud or mistake. Fraud may be presumed from facts and circumstances, the character of the contract, and the nature and condition of the whole transaction.

By W. P. MAULSBY for the appellee.

1st. The prayer for the appellee's bill of complaint, is *not* for a specific execution of a contract, but for an injunction to restrain proceedings at law against the appellee, (the complainant below) on the judgments mentioned in the bill, on the ground that the contract set out constitutes an equitable bar to further proceedings by the appellant, (the respondent below) to collect the money alleged to be due on said judgments, from the appellee.

2nd. The bill does *not* pray for an injunction against proceedings against the other defendants in the judgments, but is confined to relief to the appellee, the party to the contract.

3rd. Whatever the legal effect of the contract may be, as to releasing the other defendants, is immaterial, since the appellant cannot be relieved of his mistake of the law, even if he had established that he was mistaken, of which there is no proof.

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4th. The other defendants, *Boyle* and *Crabbs*, had paid to the appellant their proportion of the amount of the judgments, before the bill was filed, and nothing is involved in this case, except the proportion of the appellee.

5th. The appellant is bound by his contract, unless it were fraudulently obtained by the appellee. The answer alleges fraud—but the testimony does not sustain the allegation;—the transaction is fair and bona fide. Whether either of the parties, and which of them, made a good or a bad bargain, the court will not inquire.

CHAMBERS, J., delivered the opinion of this court.

This is an appeal from a decree for a perpetual injunction issued to restrain a plaintiff at law from proceeding to enforce a judgment upon the ground, that since the judgment he has entered into an agreement to receive from one of the defendants in the judgment, a conveyance of certain real property in discharge of the judgment.

We lay no stress upon the fact that one hundred and fifty dollars in cash was also paid by the defendant, because the payment of part of an admitted debt is neither in law or equity a good consideration for abandoning all claim to the residue. It is to be regarded simply as a discharge *pro tanto* of the judgment, leaving the balance of the judgment debt as the subject of the agreement. To entitle the debtor to exemption from the payment of his debt either at law or in equity, he must prove a release or payment, or an agreement to receive some equivalent in satisfaction. In this case, neither a release nor payment is relied on, and could not be, inasmuch as such a defence would be properly made in the court of law, on the return of the execution, and nowhere else. The debtor relies on the agreement set forth in the bill, by which he alleges it was stipulated that his interest in certain land should be passed to the creditor and received in satisfaction of the debt. This defence is not sufficient at law to arrest proceedings on the judgment. The debtor can there only obtain advantage of the agreement by an action of damages sustained

by a breach of it after the judgment debt has been collected by execution. He has therefore asked relief in a Court of Chancery, where, by the process of a perpetual injunction, he seeks to enforce the execution of the agreement according to its letter. It has been denied in argument that this is to be regarded as a bill to enforce a specific execution of a contract; but we think that all principles which apply to the case of a bill for specific performance, apply with equal force to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution. This case most strongly illustrates the propriety of such a principle. The bill which should be filed for specific execution of this contract, would require the party to receive a conveyance and execute an instrument which should discharge and exonerate the complainant from all liability in virtue of said judgment. This discharge presented to the court of law, would prevent any further proceedings against him on the judgment. The bill before us by a more direct mode, procures from the Chancery Court the same, a peremptory mandate, that no further proceeding against him be had on the judgment. It is not possible that a distinction can be made in regard to the principles which regulate the Chancery Court in the one case or the other.

The leading object in every such case is to carry into full effect, the exact objects and intentions of the parties, on the ground that where an honest and fair contract has been entered into by parties competent to engage without imposition or malpractice on either side, no advantage should be taken by either of any subsequent change of circumstances or of opinion which might alter, or be supposed to alter, the benefits resulting to the parties respectively. A court of equity, professing as it does to lend its aid exclusively to cases in which a claim can be conscientiously enforced, will never coerce the specific performance of a contract for a party who has not acted fairly, openly and without suppression of any important fact, or the expression of any falsehood. Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made

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the basis of the contract, this extraordinary jurisdiction of the court will not be exercised by coercing a specific performance.

Without going further into an investigation of the facts of this case, we are of opinion that the agreement in this case is not a fair and equitable one. The debtor proposes to convey his interest in a house and lot in discharge of a debt of some five or six hundred dollars. If he has no interest he asks the court to compel the creditor to exonerate him for no consideration whatever. Surely that cannot be consistent with conscience or equity, nor could it be so intended by either party. If it was intended by the debtor to obtain a release by nominally giving an equivalent, knowing that in fact it was merely nominal, it would be a fraud. If he did intend it should be more than nominal, it is necessary to show it to be so. Then, it is said, he had an interest under the mortgage from *McKenzie* to himself, *Boyle* and *Krebs*. This mortgage was executed to indemnify the grantees for certain liabilities as sureties, and it is not alleged that any payment or advance had been made by either of them, until the payment of the \$150 mentioned in this agreement; of the nature of his title or the extent of his interest, not one word was said to the creditor, the appellant, nor is there the least proof that he ever had the slightest information, nor does it appear that he had any cause to doubt when the offer was made to convey to him the right, title and interest of the appellee, it was anything else but the legal title in the property. But without stopping to consider what would be the effect of such a state of things, it is enough here to say that the mortgage deed had not been recorded within the time required by law.

The result was that the appellee could not convey any interest whatever. He could only convey the privilege of prosecuting a suit in Chancery to have the mortgage deed recorded, and obtain whatever interest had thereby been conveyed to the appellee subject to all intermediate incumbrances.

The authorities cited fully establish the proposition that a vendee will not be required to take such a title. The clear intention of a contract of sale, as we must regard this, is to get



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a title, not a law suit. The late case of *Buchanan* and *Lorman* in this court, recognizes this doctrine, and we think properly. No other intention can be ascribed to the parties unless the terms used indicate their knowledge that such is not the character of the interest which is the subject of the contract. A ground of error in this decree not alluded to at the bar, is that it made no provision for the transfer to the appellant, of whatever the appellee might convey.

True it appears by the proceedings, that during this controversy, a deed was tendered, but it was never accepted or delivered. It is quite clear that when the decree required a discharge to the debtor, it ought at the same time to have provided for his executing and delivering a conveyance of his interest in the house and lot.

It is therefore the opinion of this court, that there is error in the decree of *Carroll* county court, and that the same should be reversed with costs.

But as the appellee is entitled to the credit of \$150, admitted to be paid, the injunction should be ordered to stand to that extent, and as to every other purpose, be dissolved. A decree in conformity to these views will be signed.

DECREE REVERSED WITH COSTS.

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CATHARINE AND ELIZABETH SWOPE, AND D. H. BAUGHN'S  
LESSEE vs. WILLIAM SWOPE.—*December, 1847.*

In arriving at a testator's intention, as expressed in any clause of his will, we are to give as far as is consistent with such intention, some meaning and operation to every expression contained in the clause.

A testator devised to his wife all his real and personal estate "as long as she continues my widow, but if she intermarries she is to have no more than the law allows her, and the residue to be equally divided among my sons and daughters; but if she continues my widow, she is to hold, enjoy or dispose of it at her discretion, as I do at present." Held, that all that is or was intended to be given to the widow, was an estate during widowhood, on condition that

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if she married she was thereafter to have nothing more than what the law would have allowed her had no such devise been made; but if she continued his widow, then a fee simple was given her.

**APPEAL** from *Washington* County Court.

This was an action of *ejectment* brought on the 23d September, 1835, by the appellants for a tract or parcel of land called "*Colonel*."

The cause was submitted upon a statement of facts, which incorporated the will of *John Swope*, the material clause of which will be found in the opinion of this court. The plaintiffs claimed as heirs-at-law of *John Swope*, and the defendant who insisted that his will conveyed a fee to the testator's widow, who died unmarried, claimed under her will.

The county court rendered judgment for the defendant, and the lessors of the plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By SPENCE for the appellants, and

By ROMAN and MASON for the appellee.

DORSEY, J., delivered the opinion of this court.

The only question in this case, is whether the widow of *John Swope* (who never contracted a second marriage) took a life or fee simple estate, in the lands devised to her by the following clause in her husband's will, viz :

"After my debts and funeral charges are paid, I give and bequeath unto my wife all my real and personal estate as long as she continues my widow; but if she intermarries she is to have no more than the law allows her, and the residue to be equally divided among my sons *David* and *John*, and daughters *Sally*, *Elizabeth*, and *Nancy*, but if she continues my widow, she is to hold, enjoy or dispose of it at her discretion, as I do at present."

In arriving at a testator's intention, as expressed in any clause of his will, we are to give, as far as is consistent with such

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intention, some meaning and operation to every expression contained in the clause. This cannot possibly be done if the appellant's interpretation of the will be adopted; that all that is, or was intended to be given to the widow, was an estate during widowhood, on condition that if she married, she was thereafter to have nothing more than what the law would have allowed to her, had no such devise been made; and that the residue of the property should be equally divided amongst his five children. Had the devise stopped there, the intention of the testator as deduced by the appellants, would have been fully and unequivocally expressed; and had such been the only intention of the testator, the devise would there have terminated. But the devise did not end there, and the testator proceeds to express his further intent in reference to the disposition of his property, in the event of his wife's never afterwards marrying, in the following language: "but if she continue my widow, she is to hold, enjoy, or dispose of it, at her discretion, as I do at present;" which expression in a last will and testament is abundantly sufficient to give a fee simple estate; and must be held to operate accordingly, in the will now under consideration.

It appears that the testator in the clause of his will before us, designed to dispose of his property in reference to two contingencies, the marrying, or not marrying of his widow: the occurrence of either of which was to have a controlling influence over the disposition he intended to make of his estate. In the first part of the devise to his wife, he intended to declare how he disposed of his property in the event of her marrying; that she should have the whole until her marriage, and thenceforth she was to have no more than what the law allowed her; and the residue was to be equally divided between the five children. But under the second contingency; that is, the widow's not marrying, the testator, by the latter part of the devise, gave to her an absolute or fee simple estate in all his property.

The *pro forma* judgment of the county court is affirmed.

JUDGMENT AFFIRMED.

CHAMBERS, J., dissented.

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West vs. Chappell.—1847.

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ERASMUS WEST vs. WILLIAM O. CHAPPELL, *Adm'r of WILLIAM WEST.*—December, 1847.

Upon a single bill payable to *W.*, administrator of *R.*, the administrator of *W.* may declare and recover against the obligor.

The administrator *de bonis non* of *R.* would have no right to such a single bill, until the Orphans court, under the act of 1820, ch. 74, sec. 3, upon application, had directed the administrator of *W.* to deliver such bill to him.

That act impliedly clothed the Orphans court with authority to enquire, as preliminary to such an order, into the fact, whether the property claimed was or not administered. Until the order was passed, the title to the bill remained in the executor or administrator of the deceased administrator, the obligee.

But even after an order for the delivery of such a single bill, a suit upon it must be brought in the name of the legal representative of the obligee, for in him the legal title would remain; no authority being given by the act to sue in any other name.

If the fund represented by the single bill had been administered, it would be unjust to the obligee's estate to order it to be delivered up to the administrator *de bonis non* of *R.*

APPEAL from *Montgomery County Court.*

This was an action of *debt*, brought on the 8th November, 1842, by the appellee against the appellant.

The plaintiff declared on a single bill, following its description precisely, *viz* :

\$217 98. Six months after date I promise to pay *William West*, administrator of *Richard West*, the sum of two hundred and seventeen dollars and ninety-eight cents, current money, with interest from date, for value received, as witness my hand and seal this 4th Nov'r, 1833. ERASMUS WEST. (Seal.)

And alleged that the said writing obligatory in the declaration mentioned, was taken and received by the said *William West*, as administrator of *Richard West*, late of said county, deceased, and after the making thereof the said *William West*, administrator of *Richard West*, departed this life, without having administered all the assets of the said *Richard*, and had the said writing obligatory to the time of his death in his possession unadministered as a part thereof, and after the death of the said *William West*, administrator of said *Richard*, letters of administra-



tion on the estate of said *Richard*, which were unadministered by the said *William*, were duly granted by the Orphans court of the county aforesaid, to the said defendant, and letters of administration on the estate of the said *William* were granted by the Orphans court of the county aforesaid to the said plaintiff, and this, &c.

The defendant, after *oyer* granted of the said single bill, demurred generally to the declaration, in which the plaintiff joined. The court rendered judgment for the plaintiff, and the defendant prosecuted this appeal.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By BREWER for the appellants, and

By CARTER for the appellee.

The act of 1820, ch. 174, sec. 3, declares that whenever letters of administration *de bonis non* have heretofore or may hereafter be granted by the Orphans court, the said court is hereby authorized on the application of the administrator *de bonis non* to pass an order directing the executor or executors, administrator or administrators, as the case may be, of the deceased executor or administrator, to deliver over to the administrator *de bonis non* all the bonds, notes, &c. which the deceased executor or administrator may have taken, received or had as executor or administrator at the time of his death, &c.

ARCHER, C. J., delivered the opinion of this court.

No right to the single bill upon which this suit is brought, would vest in the administrator *de bonis non* until the action of the Orphans court was had in pursuance of the act of 1820, ch. 174. That act, in authorizing the Orphans court to pass an order for the delivery over to the administrator *de bonis non* of the property therein described, impliedly clothed that court with authority to enquire, as preliminary to such order, into the fact, whether the property was administered, or unadministered. It is to be remarked, that the act does not vest the title

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to such property in the administrator *de bonis non*; nor does it give the right of possession to him, except upon the order of the Orphans court. The act is evidently founded on the idea that the property therein described may be unadministered property, but it does not treat it absolutely as such, the Orphans court being authorized, not directed, to pass the order on application. Until such order is obtained from the Orphans court, upon examination had by them, the title remains in the deceased executor or administrator, who alone is capable of suing on the note. And, indeed, even after an order for the delivery of the single bill, he could not sue in his own name as administrator *de bonis non*, but must use the name of the executor or administrator of the deceased obligor, for in him would remain the legal title, no authority being given by the act to sue in his own name.

Any other interpretation of the act of 1820, ch. 174, than that which we have given to it, would, in many cases, work the greatest injustice. For, if the evidences of debt, &c. which the deceased executor or administrator may have received, or had as executor, shall absolutely pass over to the hands of the administrator *de bonis non*, without enquiry in all cases, then even where such executor or administrator may have closed his accounts in the Orphans court, and finally settled his accounts and distributed the assets, his estate would be made to surrender all evidences of debt taken by him in the course of his administration, and which at his death may have been on hand. A construction which would lead to such results could not be sanctioned.

JUDGMENT AFFIRMED.

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Gordon's Ex'r vs. Mayor, &c. of Baltimore.—1847.

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WM. K. GORDON, *Ex'r* of SAMUEL GORDON vs. THE MAYOR  
AND CITY COUNCIL OF BALTIMORE.—*December, 1847.*

The right to tax bank stock was not imparted to the city of *Baltimore* for the first time by the act of 1841, ch. 23.

The act incorporating the city of *Baltimore*, granted the taxing power in the most comprehensive terms, without any limitation as to the objects on which the power was to operate, and was confirmed by the act of 1817, ch. 148, as to property within the city.

The stock of a bank is the representative of its whole property; and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the company becomes exempt from taxation. To tax both its real and personal property and its stock, would be a double tax, and therefore illegal and unjust.

The act of 1821, ch. 131, sec. 11, did not restrain the city of *Baltimore* from taxing bank stock within her corporate limits; such an intention is not clearly expressed in that act.

The stipulation in the act of 1821, not to impose any further tax upon the banks mentioned in it, during the continuance of their charters, was intended to protect the banks against any additional tax for twenty years, which might be imposed by the legislature for State purposes. The terms further tax, under the circumstances, have no application to the city of *Baltimore*. It was not intended to exempt the banks there situated from all taxation.

The intention of the act of 1841, ch. 23, was to subject the stock of the banks to both State and city taxation. In relation to the State, this was a violation of the act of 1821. The right of the city to tax the stock, is unaffected by any constitutional inhibition.

An act is not necessarily inoperative, where its whole purpose cannot be carried into effect.

It is a sound rule in the exposition of statutes, that they should be so construed as not to suffer any part of them to be defeated or eluded.

The tax on bank stock under the act of 1841, not being paid to the city of *Baltimore* by a stockholder, a non-resident, the city proceeded by way of attachment against the stock. After judgment of condemnation and execution levied upon the stock, the executor of the shareholder paid the city under protest, and brought an action of assumpsit to recover back the money, on the ground that the tax was illegally exacted. *Held,*

1. That money paid on an execution issued upon a judgment of a court of competent jurisdiction, as in this case, cannot be recovered back in assumpsit, although it was afterwards discovered that the money was not due, and the plaintiff is in a situation to prove the fact.
2. Where money has been paid under the sentence or judgment of a court which has no jurisdiction whatever in respect of the subject matter, an action to recover it back may be maintained.

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3. With regard to the force and legal effect to be attributed to a domestic judgment, there is no distinction between a judgment of condemnation rendered in an attachment on warrant, in a case where the requisitions of the attachment laws have been complied with, and a judgment *in personam*.

Municipal and private corporations may proceed under the act of 1832, ch. 280, as natural persons may, to recover debts due them by attachment on warrant. And where the attachment is laid upon property within the State, though the debtor is a non-resident, there can be no objection to the jurisdiction of the courts to enforce the claim by condemnation and sale of the property attached.

Exemptions claimed under legislative acts, should be so clearly secured and granted, as to be free from all doubt and ambiguity. Otherwise the immunity claimed will not be considered as surrendered by the public. Various decided cases on this subject considered.

### APPEAL from *Baltimore County Court*.

This was an action of *assumpsit* brought to January term, 1845, by the appellant against the appellee. The case was submitted upon the following statement of facts:

It is admitted in the above case, that the *President and Directors of the Union Bank of Maryland*, were chartered prior to the year 1821, and that they duly accepted and have complied with the terms and conditions held out to them in and by the State, in an act of the General Assembly of *Maryland*, passed in said year, chapter 131.

It is admitted that the said *William K. Gordon, Executor of Samuel Gordon*, as well as his intestate, were citizens of and residents of the *State of Virginia*; that letters testamentary, with the will annexed, upon the estate of the said *Samuel Gordon*, were in due form of law granted to the said *William K. Gordon* by the Orphans court of *Baltimore county*.

It is also admitted that in the lifetime of said *Samuel Gordon*, the shares of stock held by him in the said *Union Bank of Maryland*, were assessed, valued and taxed by the said *Mayor and City Council of Baltimore*, to the amount of \$359 85; that said sum not being paid, an attachment or warrant was issued against *Samuel Gordon*, at the suit of the said *Mayor and City Council of Baltimore*, and prosecuted to judgment of condemnation by default in *Baltimore county court*. Whereupon a *feri facias* was issued upon certain shares of



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bank stock of the estate of the said *Samuel Gordon*, which will appear by reference to paper A, which is herewith filed, and which it is agreed shall be considered as a part of this agreement.

*Mayor and City Council vs. Samuel Gordon.*

Paper A.—*Fi. fa.* in case No. 46.

	Debt, . . .	\$359 85
	Int., . . .	14 11
	Costs, . . .	15 68
		<hr/>
June 15th, 1843, received payment		\$389 64
for N. TRACY, sheriff,	Com., &c. . .	20 51
		<hr/>
<i>T. J. Laws.</i>		\$410 15

On the back whereof is the following, to wit :

Whereas I, *Wm. K. Gordon*, executor of *Samuel Gordon*, deceased, have paid the tax and charges of the annexed Bill, Now I do hereby protest against the exaction of said payment as against law and oppressive, and insist upon the re-payment of the same, and all costs and interest by the city of *Baltimore*, when the illegality shall be ascertained by the decision of the Supreme Court of the *United States*, or otherwise.

Notice of the above protest admitted. N. TRACY, *Sh'ff.*

It is admitted that the said *Wm. K. Gordon*, as executor, paid upon the said judgment and *fieri facias* for the said tax, interest and costs, the sum of \$410 15, at the same time protesting against the exaction of said payment, as against law and oppressive, and insisted that the same and all costs and interest should be repaid by the city of *Baltimore*; that said amount of taxes above mentioned has been paid over to the *Mayor and City Council of Baltimore*.

It is also admitted that the said taxes amounting to \$359 85, so as aforesaid levied by the said *Mayor and City Council of Baltimore*, on the stock so as aforesaid held by the said *Samuel Gordon*, and which was so as aforesaid paid by the said *William K. Gordon*, executor; that the stock in said bank on which the said taxes were so levied and paid, were duly and properly assessed to said *Samuel Gordon*, as a part of his

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assessable property, under and in conformity to the acts of Assembly and ordinances of the city of *Baltimore*, in that case made and provided, and that said taxes were duly levied by the said *Mayor and City Council of Baltimore*, for the following years, viz: 1842, 1843 and 1844. It is also admitted that the said taxes so as aforesaid levied and collected by the said *Mayor and City Council*, of *William K. Gordon as executor of Samuel Gordon*, were so levied and collected as city taxes from the said *Gordon*, for the purposes and uses of the said city of *Baltimore*.

It is also admitted that application was made to the said *Mayor and City Council of Baltimore* by the said *William K. Gordon*, executor of *S. G.*, and others, for the refunding by the said city of the taxes so as aforesaid paid by the said *William K. Gordon*, executor of *S. G.*, and that the said *Mayor and City Council of Baltimore* passed the resolution No. 119, of the resolutions of the said *Mayor and City Council of Baltimore*, at its January session, 1845. And said resolution it is agreed shall be a part of this statement, and may be read as such from the printed ordinances of the city of *Baltimore*.

And it is also agreed that any ordinance of the city of *Baltimore*, or any act of Assembly which either party may desire to use in the hearing of this case, either in the county court or Court of Appeals, may be used and read as part of this statement, from the printed ordinances of the city of *Baltimore* and the printed acts of Assembly of *Maryland*, to have the same effect as a part of this statement as if inserted at large and duly authenticated.

It is further agreed that it shall be competent for the court to draw such and other inferences of facts from those above agreed on, as a jury could do if the same were offered in evidence to them. It is further agreed that if upon the foregoing statement of facts, the court shall be of opinion that the said *Wm. K. Gordon*, executor of *S. G.*, is entitled to recover back from the said *Mayor and City Council of Baltimore* the taxes so as aforesaid paid by him, or any part thereof, then the court shall render judgment against the said *Mayor and City Council*

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of *Baltimore* for the amount of said taxes, or so much thereof as the court shall be of opinion the said *William K. Gordon*, executor of *S. G.*, is entitled to recover back from the said *Mayor and City Council of Baltimore* with costs. But if the court shall be of opinion that the said *William K. Gordon*, executor of *S. G.*, is not entitled to recover back the said taxes so as aforesaid paid by him, or any part thereof, from the said *Mayor and City Council of Baltimore*, then the court shall render judgment in favor of the said *Mayor and City Council*, the defendants in this action, with costs of suit.

And it is agreed that either party may appeal from the judgment of *Baltimore* county court upon the foregoing statement; and that upon appeal by either party, the Court of Appeals may render judgment on the foregoing statement of facts and agreement.

The county court rendered judgment *pro forma* for the defendants, and the plaintiff below prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, MAGRUDER and MARTIN, J.

By DULANY and MEREDITH for the appellant, and

By PRESSTMAN and McMAHON for the appellee.

MARTIN, J., delivered the opinion of this court.

In this case the tax in controversy was imposed by the *Mayor and City Council of Baltimore*, in pursuance of an act of the General Assembly of *Maryland*, passed on the first of April, 1841; and it has been contended on the part of the appellant, that this act, so far as it subjected the stock of the *Union Bank of Maryland* to valuation, assessment, and taxation, was unconstitutional and void; on the ground that it impaired the obligation of the contract created between the State and the Bank, by the act of Assembly of 1821, ch. 131.

This is the first and principal question raised for our opinion upon this record.

The tax thus levied by the appellee upon the shares of stock

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held by the appellant's testator in the *Union Bank*, was imposed in conformity with the act of 1841, ch. 23; but it is a mistake to suppose that the right to tax the stock was imparted to the city for the first time by the provisions of that statute. By the act of Assembly, incorporating the city of *Baltimore*, the taxing power is granted in the most comprehensive terms, and without any limitation as to the objects on which the power is to operate. And by the subsequent act of 1817, ch. 148, sec. 4, it is declared,

“That the *Mayor and City Council of Baltimore* shall have power to lay and collect direct taxes on the assessment of private property within the city, to such amount as may be thought necessary for the public or city purposes, and may enforce the collection of all dues and impositions, except fines, &c. in the same manner as is now provided with respect to city taxes.”

It is perfectly understood that the stock of a bank is the representative of its whole property; and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the company becomes exempt from taxation. To tax both the real or personal property, and the stock, would be a double tax, and therefore illegal and unjust. 12 *G. & J.* 117. And it does not appear that the stock of this bank was taxed *eo nomine* by the city, prior to the year 1842, and then under and by virtue of the act of 1841, ch. 23; but as the *situs* of the stock was within the limits of the city, there can be no doubt that at the period when the contract of 1821 was entered into between the State and the banks, the city possessed the right to have valued and assessed the stock in the hands of a shareholder, as a legitimate object of taxation.

By the 11th section of the act of 1821, ch. 131, it is declared:

“That upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.

And it has been contended by the counsel for the appellant,



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that it was the object of the contract thus created, not only to restrain the Legislature from imposing additional taxes upon the banks, during the continuance of their charters, but also to secure them against taxation by the city; and that it was the imperative duty of the State, in the exercise of her unquestionable control over the constitution and laws of this municipal corporation, so to have modified or repealed the taxing power of the city, as to have accomplished what is asserted to have been the design of this contract, an absolute immunity from city taxation.

The counsel for the appellee have denied that this is to be considered as the true construction of the contract, and have insisted, that as the object of the contract was to operate on the taxing power; and as the contract itself was created by a legislative grant of certain immunities and privileges, private in their character, that interpretation is to be placed upon it if there is any ambiguity in its terms, which is more favorable to the State; and that the exemption claimed by the appellant cannot be sustained unless the court is satisfied, that an intention to liberate the bank from city, as well as State taxation, is clearly and indisputably expressed.

This proposition is maintained, we think, by the adjudged cases, both in England, and in the tribunals of this country.

In the case of the *Providence Bank vs. Billings & Pittman*, 4 Pet. 561, the question arose with respect to the right of the Legislature of *Rhode Island* to impose a tax upon the bank, which had been chartered in the usual mode, and without any stipulation in reference to the taxing power of the State.

The right of the State to impose the tax was upheld by the Supreme Court, and the late Chief Justice, in delivering the opinion, said:

“That the taxing power is of vital importance—that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently

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valuable to induce a partial release of it may not exist: but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear."

In the case by the *Stourbridge Canal* against *Wheeley, 2 Barn & Adolph. 792, Lord Tenterden*, when speaking of the rule, by which an act of Parliament, incorporating a Canal Company, was to be expounded, says:

"The canal having been made under the provisions of an act of Parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this:—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act."

In the case of the *Elsebe, 5 Rob. 182, Sir William Scott* stated with great clearness, the difference between the rules by which the grants of the Crown are interpreted, and those which are applied in the construction of the grants of individuals. He said,

"Against an individual, it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or in the taker; with regard to the grant of the sovereign, it is far otherwise. It is not held by the sovereign himself as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed."

The same doctrine is announced in *Barrett vs. The Stockton and Darlington Railway Company, 2 Manning and Granger, 134, 40, Eng. Com. Law Rep. 298*, and in the very able opinion delivered by the Chief Justice of the Supreme Court, in the case of the *Charles River Bridge* against the *Warren Bridge, 11 Pet. 420*.

With this rule of construction for our guide, we proceed to an examination of the terms of the contract of 1821, as they are expressed in the statute; and the question is, whether the exemption claimed by the *Union Bank*, is so clearly secured and granted, as to be free from all doubt and ambiguity?

On this point, our opinion is adverse to the claim asserted by the appellant.

When the contract between the State and the banks was entered into in the year 1821, the banks embraced by the statute were subject to a tax of twenty cents on every hundred dollars of the capital stock actually paid in, or which should thereafter be paid in, to be appropriated as a fund for the establishment of free schools; and the stipulation not to impose *any further tax* "upon them during the continuance of their charters," was intended, we think, to protect the banks against any *additional* tax, for the period of twenty years, which might be imposed by the legislature for State purposes. Under the circumstances of this case, the words "further tax," have no application to the city of *Baltimore*. And if the object of the contract had been, as is maintained by the counsel for the appellant, to exempt the banks from *all* taxation, whether imposed by the State or city, it is impossible to believe that the parties would not have employed more comprehensive terms, and have used language better calculated to accomplish their purpose.

It has been seen, that on the 1st April, 1841, the legislature passed an act for the general assessment and valuation of property in the State, and to provide a tax to pay the debts of the State.

By the first section, it is enacted among other things, that all stocks or shares in any bank, incorporated by the State, shall be valued agreeably to the directions of the act, and shall be chargeable according to such valuation, with the public assessment.

By the 59th section it is declared, that so much of the several acts heretofore passed in relation to the assessment and collection of taxes, as may come within the provisions of this

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act, and conflict therewith, are repealed: and by the 60th section, that from and after the year eighteen hundred and forty-one, all county, district and city taxes shall be assessed on the property, valued under the provisions of this act, any thing in any other act to the contrary notwithstanding.

By the 29th section it is provided, that any person who shall feel himself aggrieved by the decision of the appeal tax court, upon any question arising upon the review of the valuation aforesaid, whereby property is valued, which in the opinion of such person ought not to be valued, &c. may prosecute an appeal from the decision aforesaid to the Court of Appeals: and by the 34th section it is declared, that immediately after the determination of any such appeal, it shall be the duty of the clerk of the Court of Appeals to send a copy of the opinion of the court to the appeal tax court, to be preserved by them; and it shall be the duty of the appeal tax court, previous to the levy for the year 1842, being made by the *Mayor and City Council of Baltimore*, to review, and correct if necessary, the valuations as aforesaid made, in conformity with the opinions which may be expressed by the Court of Appeals, and report the same to the *Mayor and City Council*.

In the case of *Gordon* against the *Appeal Tax Court*, 3 *How.* 133, it was decided by the Supreme Court, that the State was restrained from taxing the banks, chartered previous to the year 1821, by the contract to which we have adverted, during the continuance of their charters; and the proposition presented by the counsel for the appellant, is that the taxing power of the State and of the city, both with respect to the objects to be taxed, and the mode in which the taxes were to be collected, are indissolubly connected by the act of 1841, ch. 23; and that as the State was disabled from taxing the banks for twenty years, no tax could be imposed upon the stock for that period by the city of *Baltimore*.

To this proposition we cannot assent.

It was the intention of the legislature by the act of 1841, ch. 23, to subject the stock of this bank to both State and city taxation. This is plainly declared by the provisions of the



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statute. But by the construction which has been placed upon the contract of 1821, by the Supreme Court, the State is disabled from taxing the stock for State purposes, for the period of twenty years, and the object and purpose of the law has been in this way partially frustrated. The right, however, of the city to tax the stock, according to the interpretation which we have put upon the contract, remains unaffected by any constitutional inhibition. It was, as we have already said, the intention of the legislature to subject this property to a city tax. And can it be pretended, upon any fair principle of interpretation, that the power which remains unimpaired and in full force, so far as the stipulations of the contract are concerned, should be extinguished or arrested in its operation, because the whole purpose of the legislature cannot be carried into effect? We think not.

It is a sound rule in the exposition of statutes, that they should be so construed as not to suffer any part of them to be defeated or eluded.

The taxing power of the city was unfettered by any constitutional restrictions; and the tax imposed on the stock of the *Union Bank* in this case, was in accordance with the provisions of the act of 1841, ch. 23. It must therefore be maintained.

It appears from the agreed statement of facts exhibited by this record, that in the lifetime of *Samuel Gordon*, the shares of stock held by him in the *Union Bank of Maryland*, were valued, assessed and taxed by the *Mayor and City Council of Baltimore*, amounting to the sum of \$359 85; and that this sum not having been paid, an attachment on warrant was issued against *Samuel Gordon*, a resident of *Virginia*, and prosecuted to judgment of condemnation by default in *Baltimore* county court; upon this judgment, a *fiery facias* was issued and levied upon the shares of stock belonging to the estate of the said *Gordon*, and the claim having been paid by the appellant as his executor, under protest, an action of assumpsit was instituted in *Baltimore* county court, for the purpose of recovering from the appellee the amount alleged to have been illegally exacted.

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And the question presented for our consideration on this branch of the case is, whether an action to recover back the money thus paid on the execution, could be maintained by the appellant, assuming that the tax imposed upon the stock was illegal and void?

It is an established principle, and not disputed by the counsel for the appellant, that money paid on an execution issued upon a judgment of a court of competent jurisdiction, cannot be recovered back, although it was afterwards discovered that the money was not due, and the party is in a situation to prove the fact.

And it is equally well settled, that where money has been paid under the sentence or judgment of a court which has no jurisdiction whatever in respect of the subject matter, an action to recover it back may be maintained. *Newdigate vs. Davy*, 1 *Lord Ray*, 742.

With regard to the force and legal effect to be attributed to a domestic judgment, pronounced by a court of competent jurisdiction, there is no distinction between a judgment of condemnation rendered in an attachment on warrant, in a case where the requisitions of the attachment laws have been complied with, and a judgment *in personam*. *Taylor & McNeal vs. Phelps*, 1 *Har. & Gill*, 492. They stand upon the same principle; they both import absolute verity; are equally conclusive with respect to the subject matter adjudicated, and cannot be re-examined or impeached in any collateral proceeding.

In the argument on this part of the case, several points were raised and discussed by the counsel for the appellant; but in our opinion, the right of the plaintiff below to maintain this action, supposing that the tax imposed by the *Mayor and City Council of Baltimore* was illegal and unauthorised, depends upon the single question, whether the judgment of condemnation rendered in the attachment suit, was the act of a court of competent jurisdiction.

In the case of *Dugan vs. The Mayor and City Council of Baltimore*, 1 *G. & J.* 499, it was held by the Court of Appeals, that the imposition and assessment of a tax by the *Mayor and*

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*City Council*, in pursuance of their charter, created a legal obligation to pay such tax, and that it could be recovered in an action of assumpsit.

In delivering the opinion of this court, Chief Justice *Buchanan* said :

“In the *Mayor and City Council vs. Howard*, 6 Har. & John. 383, it was decided by this court, in relation to the 10th section of the act of incorporation, that the giving a remedy by distress or action of debt, was cumulative only, and did not take away the action arising by implication, or the legal obligation to pay a claim created by law. The tax for which this suit was brought, was imposed by virtue of that act, the imposition and assessment of which created the legal obligation to pay, on which the law raised an implied assumpsit, independent of the notice required by the fifth section of the ordinance, as a foundation for a summary mode of recovery, and unaffected by the omission of the collector to do his duty, which omission, though it caused the loss of the right to collect the tax by distress, and sale of the goods, left the right to recover on the original implied assumpsit unimpaired—an assumpsit raised by the law on the imposition and assessment of the tax, and not to arise on the delivery by the collector of an account of the assessment and tax.”

By the act of Assembly of 1832, ch. 280, it is declared, that the provisions of the attachment law of 1715, ch. 40, with its supplements, shall be held to apply to all debts due, and claims accruing to any corporations, to the same effect as if such corporations were natural persons; language sufficiently comprehensive to embrace all classes of corporations, whether municipal or private; and although the person against whom this attachment was directed was a non-resident, yet as the *res*, the stock, upon which the process operated was within the State, we can perceive no objection to the jurisdiction of the court.

We think, therefore, that the action instituted in this case by the appellant, could not be maintained; and on both grounds, affirm the judgment of the county court.

JUDGMENT AFFIRMED.

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Morris vs. Mayor, &c. of Baltimore.—1847.

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JOHN B. MORRIS vs. THE MAYOR AND CITY COUNCIL OF  
BALTIMORE.—*December, 1847.*

*M.*, an inhabitant of the city of *Baltimore*, was a stockholder in several banks there, chartered prior to the year 1821. The Corporation of that city imposed taxes upon the stocks of said banks for the use of the city, and assessed a portion thereof to *M.*, who *voluntarily* paid such tax. Afterwards considering said taxes illegally levied, *M.* demanded the return of the money paid by him, which the city refused. In an action of assumpsit brought to recover back the taxes paid, *Held*, that whether the tax was legal or illegal, the payment being voluntarily made, could not be recovered back.

APPEAL from *Baltimore County Court.*

This was an action of *assumpsit* brought by the appellant against the appellees, to January term, 1845. The defendants pleaded the general issue.

The cause was submitted to the county court upon the following statement of facts:

In this case it is admitted that the *President and Directors of the Union Bank of Maryland*, the *President and Directors of the Mechanics' Bank of Baltimore*, and the *President and Directors of the Bank of Baltimore*, were chartered previous to the year 1821, and that they duly accepted and complied with the terms and conditions held out to them by the *State of Maryland*, by an act of the General Assembly of *Maryland*, passed at December session, 1821, being chapter 131 of the acts of that session of Assembly.

It is also admitted that the said *John B. Morris* was and is a citizen of *Baltimore*, and resident therein, that the said *Morris* was a stockholder in each of said banks before the year 1842, and at the period when the taxes hereinafter mentioned were assessed, levied, and collected.

It is also admitted that taxes were levied by the *Mayor and City Council of Baltimore*, and paid by said *Morris* upon the stocks held by said *Morris* as aforesaid, in the said banks, to the amount of \$318 95, of which \$100 00 was paid before 1st September, 1842, and \$46 31 on 22d November, 1842,



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and \$102 16 on the 6th September, 1843, and \$70 58 on the 13th January, 1845.

It is also admitted that the said taxes, amounting to \$318 95, so as aforesaid levied by the said *M. and C. C. of B.* on the stocks so as aforesaid held by the said *Morris*, and which was so as aforesaid paid by the said *Morris*; that the stocks in said banks on which the said taxes were so levied and paid, were duly and properly assessed to said *Morris*, as a part of his assessable property, under and in conformity to the acts of Assembly and ordinances of the city of *Baltimore*, in that case made and provided; and that the said taxes were duly levied by the said *M. and C. C. of B.* for the following years, to wit: 1842, 1843 and 1844, and that the payments made by said *Morris* as aforesaid, were not made under any distress or legal process.

It is also admitted that the said taxes so as aforesaid levied and collected of the said *Morris*, were so levied and collected by the said *M. and C. C. of B.* of the said *Morris*, as city taxes for the purposes and uses of said city of *Baltimore*, and they were paid to, and received by the proper officer of the said *M. and C. C. of B.*, and by him paid to the *M. and C. C. of B.* in conformity to the charter and ordinances of the said *M. and C. C. of B.*, providing for the collection of city taxes imposed by the *M. and C. C. of B.*

It is also admitted that under the provisions of certain ordinances, passed by the said *M. and C. C. of B.*, which it is agreed shall form a part of this statement, and may be read as such from the printed ordinances of the said *M. and C. C.*; the privilege and right was given to every person chargeable with city taxes, levied by said *M. and C. C.*, to have certain deductions made for prompt payment of any of said taxes. And that said *Morris* availed himself of the provisions of said ordinance at the time and in the manner previously stated, as to a portion of the taxes so levied and collected of him by the said *M. and C. C. of B.*, and they were allowed to him and deducted from his said taxes to the extent of said payment. That on the above mentioned payments of taxes made by said

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*Morris*, he obtained a discount of 3 per cent. on \$100 00 paid in 1842, and 2 per cent. on \$102 16 paid in 1843, in conformity with the notices on said bills.

It is also admitted that on the back of the bills delivered to and paid by said *Morris* for taxes on the stock aforesaid, was endorsed the words following, to wit:

“If this bill is paid on or before the first day of July of the current year, a discount will be allowed of five per cent.”

“On or before the first day of August, four per cent.”

“On or before the first day of September, three per cent.”

“On or before the first day of October, two per cent.”

“On or before the first day of November, one per cent.”

“The collector is required to enforce the law against all persons whose taxes remain unpaid after the 1st day of November of the current year.”

It is also admitted that application was made to the said *M. and C. C. of B.* by the said *Morris* and others, in the year 1845, for the refunding by the said city of the taxes so as aforesaid paid by the said *Morris* and others, and that the said *M. and C. C.* passed the resolution No. 109, of the resolutions of the said *M. and C. C. of B.* at its January session, 1845. And said resolution it is agreed shall be a part of this statement, and may be read as such from the printed ordinances of the city of *Baltimore*.

It is also agreed that any ordinance of the city of *Baltimore*, and any act of Assembly which either party may desire to use in the hearing of this case, either in the county court or Court of Appeals, may be read and used as a part of this statement from the printed ordinances of the city of *Baltimore*, and the printed acts of Assembly of *Maryland*, to have the same effect as a part of this statement, as if it were inserted at large and duly authenticated. It is further agreed, that it shall be competent for the court to draw such and other inferences of facts from those above agreed on, as a jury could do if the same were offered in evidence to them.

It is further agreed, that if upon the foregoing statement of facts the court shall be of opinion that the said *Morris* is

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entitled to recover back from said *M. and C. C. of B.* the taxes so as aforesaid paid by him, or any part thereof, then the court shall render judgment against the said *M. and C. C. of B.* for the amount of said taxes, or so much thereof as the court shall be of opinion the said *Morris* is entitled to recover back from said *M. and C. C.* with costs. But if the court shall be of opinion that the said *Morris* is not entitled to recover back the said taxes so as aforesaid paid by him, nor any part thereof from the said *M. and C. C.*, then the court shall render judgment in favor of the *M. and C. C.*, the defendants in this action, with costs of suit.

And it is agreed that either party may appeal from the judgment of *Baltimore county court* upon the foregoing statement; and that upon appeal by either party, the Court of Appeals may render judgment on the foregoing statement of facts and agreement.

The judgment being against the plaintiff, he prosecuted an appeal to this court.

The cause was argued before ARCHER, C J., DORSEY, MA-GRUDER and MARTIN, J.

By DULANY and MEREDITH for the appellant, and

By PRESSTMAN and McMAHON for the appellees.

MARTIN, J., delivered the opinion of this court.

The validity of the tax imposed in this case upon the stock held by the appellant in the banks of *Baltimore*, chartered previous to the year 1821, is maintained by the opinion delivered at the present term, by this court, in the case of *Gordon* against the *Mayor and City Council of Baltimore*; and the only question presented for our consideration is, whether, assuming the tax to have been unauthorised and illegal, an action to recover back the sum paid, could, under the circumstances exhibited in the agreed statement of facts, be sustained by the appellant against the *Mayor and City Council of Baltimore*?

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Morris vs. Mayor, &c. of Baltimore.—1847.

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In the case of the *Mayor and City Council of Baltimore against Lefferman*, heard and decided at the December term, 1846, the doctrine of voluntary and compulsory payments was discussed with great ability by the counsel who were concerned in the cause.

All the authorities cited during the present argument were by the research of the counsel in the former case, brought to the view of the court: in both cases it is apparent that the tax was demanded and paid under the impression, sincerely and honestly entertained by both parties, that it was legally due, and although the means of vindicating himself against the assessment, if it was illegal, was as amply secured to the defendant, as if an unjust demand had been imposed upon him by an individual, the right to maintain the action was placed in the *Mayor and City Council vs. Lefferman*, as it has been in the present case, upon the ground of a supposed inequality in the condition of the parties.

After a careful review and examination of the authorities, the court announced in the case of the *Mayor and City Council against Lefferman*, what they regarded as the true doctrine upon the subject of voluntary and compulsory payments, as far as it was applicable to the case before them; and we certainly have not been able to perceive any reason for departing from the propositions there enunciated.

On the contrary, we desire to be understood as re-affirming the principles declared in the *Mayor and City Council and Lefferman*; and as that case cannot be distinguished from the one before us, we should have affirmed the judgment of the court below, even if we had considered the tax as unconstitutional and void.

JUDGMENT AFFIRMED.



## JEHU BROWN vs. ELIZABETH BROWN.—December, 1847.

Jurisdiction in cases of divorce was conferred upon the equity tribunals of this State by the act of 1841, ch. 262.

By the 2d section of that act, the court is authorised to decree *a vinculo*, when the party complained against has abandoned the party complaining, and has remained absent from the State above *five* years.

By the 3d section of the same act, a divorce *a mensa et thoro* may be granted for abandonment and desertion, without regard to its duration; or the absence of the party complained against, from the State.

The act of 1844, ch. 306, repeals those portions of the 2d section of the act of 1841, ch. 262, which require absence from the State for *five* years, on the part of the party complained against, as a cause for a divorce, *a vinculo matrimonii*; with a proviso, that no such decree shall be passed on account of abandonment, unless the court shall be satisfied by competent proof, that such abandonment has continued uninterruptedly for at least *three* years, is deliberate and final, and the separation of the parties beyond any reasonable expectation of reconciliation.

When the party complained against has *not* been absent from the State, an absolute divorce against such party cannot be decreed.

Where husband and wife, through the intervention of a trustee, execute a deed of mutual separation for their joint lives, by which provision is made for the support of the wife and children, so long as the terms of it are complied with on the part of the husband, he is exonerated from the obligation to support his wife, and it is a protection to any claim which can be made upon him for supplying her even with necessaries.

When after actual separation, husband and wife select their own remedy by the execution of a deed of separation, and continue to live separate, without any new circumstances transpiring to change their actual relations since the execution of such a deed, the court will not grant a decree *a vinculo matrimonii*.

Where the parties to a deed of separation placed themselves very much in the condition with respect to each other, which the law empowers the court to do by a decree *a mensa et thoro*, such a decree is unnecessary, and perhaps improper.

## APPEAL from the Court of Chancery.

The bill in this cause was filed on the 6th July, 1846, by the appellant, and alleged, that he in the month of December, 1824, was married to *Elizabeth Brown* of the said city, who is his present wife; that in the month of December, 1830, she, the said *Elizabeth*, left and abandoned his bed, which abandonment has continued uninterruptedly ever since; that in the spring of the year 1836, she, the said *Elizabeth*, abandoned his table and

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house, which abandonment was voluntary on her part, has continued uninterruptedly for more than ten years, and is certainly deliberate and final, and the separation beyond any expectation of reconciliation; that the said separation being thus absolutely hopeless and final, he, with the said *Elizabeth*, and her friend and trustee, *Stephen Boyd* of *Harford* county, agreed upon and solemnly executed a final deed of separation, in which he, your orator, conveyed for the use and benefit of the said *Elizabeth*, all the interest and property coming to her from her deceased father's estate, which is the only property she ever possessed, and also paid in addition to her said trustee for her sole use, a sum much more than commensurate with any claim she could have had on his very limited property, if he had died at the date of said deed; that he is advised it is unnecessary for him here to set out the various most grievous causes of the said separation, but that upon the above facts, and under the provisions of the act of Assembly, 1841, chapter 262, section 2d, as modified by 1844, chapter 306, he is entitled to a divorce from the said *Elizabeth*, *a vinculo matrimonii*, wherefore your orator humbly prays the decree of your Honor, divorcing him from the said *Elizabeth*, *a vinculo matrimonii*, and for general relief.

The answer of *Elizabeth Brown* stated: That she admits she is the wife of the complainant, and has abandoned his house, table and bed; that she is at this present time living apart from her said husband, but that until lately, he has done nothing whatsoever towards her support and maintenance; that the deed of separation mentioned in the bill of complainant was executed as is there stated, and for the consideration therein mentioned; but she says it was no part of her wish or intention that it should operate as a divorce; that the property conveyed to her by the deed aforesaid, is very inconsiderable, a part of which comes from her own father's estate, and it is by no means sufficient to support her; that the whole interest in her father's estate, as she has been informed, does not exceed one hundred and eighty dollars, and that her trustee, *Stephen Boyd*, received for her, from her said husband, *six hun-*

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*dred dollars*, the interest on which sum only is to be paid to her as she understands it, during her life; that her said husband is in affluent circumstances as she verily believes, and that she, your respondent, is wretchedly poor, feeble in health, and advanced in years; that a divorce may not be granted to her said husband, at all events, not until he has made comfortable provision for this respondent, who has devoted her youth and best exertions to his welfare and happiness.

The general replication being filed, a commission issued to take proof; evidence of the separation was given, and the deed of separation also established.

This deed, dated the 18th April, 1846, set forth:

“Whereas, it has been mutually agreed by and between the said *Jehu Brown* and *Elizabeth Brown*, that they shall and will henceforth during their joint lives live separate and apart from each other, without any sort of dependence or claim of the one upon or against the other; and it hath also been agreed, that in lieu, bar, satisfaction and discharge of all right of dower which the said *Elizabeth Brown* might or would claim in case she should survive her said husband, and of all and every right, title, claim and demand whatsoever, which she now has, or might at any time hereafter have against her said husband or his estate, or property, either in the nature of alimony or otherwise, the estate or property hereinafter described or mentioned, shall be secured to and for the sole and separate use and benefit of the said *Elizabeth Brown*, in the manner hereinafter specified; and the said *Elizabeth Brown* hereby consents and agrees to accept and take the estate and property above referred to and hereinafter mentioned, in full satisfaction and discharge of all claim of dower, and of every other claim or demand whatsoever as aforesaid, against the said *Jehu Brown* or his estate, or property, whether in the nature of alimony or otherwise, wherefore these presents are executed.”  
Now, &c. &c.

The cause coming on to be heard at December term, 1846, the Chancellor (JOHNSON) passed the following decree.

On the 6th July, 1846, the complainant filed his bill in this court, praying for a divorce *a vinculo matrimonii*, from the defendant, his wife, to whom he was married in the year 1824.

The parties are both now, and have always been, citizens of and residing in this State, and the ground of the application is that the defendant, the party complained against, abandoned the complainant upwards of ten years since; that this abandonment has continued uninterruptedly for more than ten years, is deliberate and final; and the separation beyond any expectation of reconciliation.

It is also alleged as a circumstance marking the final nature of the separation, that the parties on the 18th of April, 1846, agreed upon and executed a deed of separation, by which provision was made for the support and maintenance of the wife, fully equal to such portion of the property of the husband, as the law would have given her in the event of his death.

This deed of separation is exhibited with and made a part of the bill. By it certain property is conveyed by the husband to a trustee, for the sole and separate use of the wife, with power with the concurrence of the trustee, of disposing thereof whilst living, or by her will, or in case of her death without will, in trust for her children and their descendants; or in case she should die without children or descendants living at her death, then in trust for her right heirs.

The deed also contains a stipulation, that the parties, *Brown and wife*, shall and will henceforth during their joint lives, live separate and apart from each other, without any sort of dependence or claim of the one upon or against the other.

In the answer of the wife, the abandonment is admitted, as is the deed of separation, though the application for a divorce is resisted, at least until the husband shall make a comfortable provision for her, which she alleges is not done by the deed.

Under the commission which issued to take proof, the continued separation of the parties for ten years past is proved, as is also the great improbability of their reconciliation.

Upon the return of the commission, the case by agreement of counsel was set down for a final decree on the 25th of this



month, and is now submitted upon notes filed by the complainant's solicitor.

Jurisdiction in cases of application for divorces was conferred upon the equity tribunals of this State by the act of Assembly of December session, 1841, chap. 262, since when, two supplements have been passed, the first in 1843, chap. 287, the last in 1844, chap. 306.

By the second section of the original act, the causes for which divorces *a vinculo matrimonii* may be granted are stated; these are four in number, and the fourth, which is supposed to embrace this case, authorises the court to decree a divorce of this absolute character, where the party complained against has abandoned the party complaining, and has remained absent from the State for five years. By the 3d section of the same act, a divorce *a mensa et thoro* may be granted for abandonment and desertion, without regard to its duration or the absence of the party complained against from the State.

The act of 1844, chap. 306, repeals those portions of the second section of the original act, which require absence from the State for five years on the part of the party complained against, as a cause for a divorce *a vinculo matrimonii*, with a proviso that no such decree shall be passed on account of abandonment, unless the court shall be satisfied by competent proof that such abandonment has continued uninterruptedly for at least three years, and is deliberate and final, and the separation of the parties beyond any reasonable expectation of reconciliation.

This latter law it is supposed by the complainant's solicitor, not only changes so much of the second section of the act of 1841, chap. 262, as makes it necessary that the party complained against should have remained absent from the State for five years, but renders absence from the State for any period unnecessary.

It is not clear, however, that this is the true construction of the act of 1844. Its language is, that all such parts of the second section of the act to which it is a supplement, as

requires absence from the State for five years, &c., be and the same are hereby repealed.

It does not say that absence from the State for any period shall not be necessary to entitle a party to an absolute divorce, but that absence for five years shall not be required. If the Legislature had designed to dispense with absence from the State altogether, as one of the ingredients constituting the ground for an absolute divorce, it is presumed they would have expressed their meaning in terms free from all ambiguity. The original act required such absence to continue for five years, and this period the Legislature of 1844, thought proper to abridge, but it is not manifest they intended to dispense with it altogether.

It has been asked why it was put in the original act? This is a question which this court cannot answer, but finding it there it must pay respect to it, as one of the circumstances constituting cause for a divorce *a vinculo matrimonii*, until the authority which placed it there strikes it out, which I am not satisfied entirely they intended to do by the passage of the act of 1844.

This construction of these acts seems to me in conformity with what I understood to be the opinion delivered by one at least of the judges of the Court of Appeals, at December term, 1845, and the opinions of the other judges do not in any manner conflict with it. The party complained against then in this case, not having been absent from the State for any period, it may be doubted whether upon the true construction of the acts of Assembly upon the subject, an absolute divorce could be decreed.

There is, however, another objection to the interposition of the court in this case, which renders it unnecessary to place the decree about to be passed upon the ground, that the facts alleged and proved, do not bring this case within the provisions of the acts.

The parties we have seen, on the 18th of April last executed a deed of separation, by which provision was made for the support of the wife and children, and by which these parties

mutually agreed during their joint lives, to live separate and apart from each other. This deed, so long as the terms of it are complied with on the part of the husband, exonerates him from the obligation to support his wife, and is a protection against any claim which can be made upon him for supplying her even with necessaries. 2 *Kent Com.* 161. *Todd vs. Stokes*, 1 *Salk.* 116. *Nurse vs. Craig*, 5 *Bos. & Pul.* 148. *Baker vs. Barney*, 8 *Johns. Rep.* 72. Having selected their own remedy by the execution of this deed, after the actual separation had lasted nearly or quite ten years, no sufficient reason has been assigned why within less than three months from the date of the deed, this court should be called upon absolutely to dissolve the marriage. It is not alleged or proved, that any circumstances have transpired since the execution of the deed which render it necessary or proper that the relations of the parties as established by that instrument should be changed, and the court would be most reluctant to do so, especially in the manner and to the extent proposed by this bill, unless a case of strong urgency was made out, as the effect of such a change upon the rights secured by the deed, might occasion embarrassing, if not injurious consequences.

The third section of the original act authorises the courts of equity upon applications for divorces *a vinculo matrimonii*, to decree them *a mensa et thoro*, if the causes proved are sufficient to entitle the parties to such relief; and it has already been stated that abandonment and desertion alone, without regard to its duration or the absence from the State of the party complained against, is sufficient cause for a divorce of this qualified character. But a decree of this description is rendered unnecessary, and would perhaps be improper in this case, in consequence of the deed of separation, by which the parties have placed themselves very much in the condition with respect to each other, which the law would have empowered the court to do, by decreeing a limited divorce. *Hunt vs. De Blaquiére*, 5 *Bing.* 520.

For these reasons, very briefly stated, I am of opinion the bill must be dismissed, and shall so decree.

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From this decree the complainant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By J. J. SPEED for the appellant, and

By J. M. BUCHANAN for the appellee.

BY THE COURT:

Decree affirmed for the reasons assigned by the Chancellor in his opinion.

DECREE AFFIRMED.

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MARY TOMLINSON ET AL. vs. THOMAS J. MCKAIG, GUSTAVUS BEALL AND WIFE, ET AL.—*December, 1847.*

By decree of a county court as a court of equity, passed in 1836, certain lands belonging to infants and others were ordered to be sold. The trustee appointed to sell the same, reported a sale, which was finally ratified. The purchaser by his last will devised the lands to the complainants, who, in 1839, filed their bill in the same court to procure a conveyance from the trustee. The decree thus sought to be carried out was not appealed from and remained unreversed. In the consideration of that decree, *Held,*

1. That if the bill filed in the cause in which that decree was passed, was founded on the act of 1785, ch. 72, the jurisdiction of the court could not be sustained, because there was no allegation in the bill that it would be for the interest and advantage of the infants, and of the other persons concerned, that the lands described in the bill should be sold.
2. Under the act of 1820, ch. 191, sec. 8, if the parties entitled to an intestate's estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, an application should be made to the county court of the county where the estate lies, whose course of procedure is there prescribed, to sell the land, and distribute the proceeds.
3. The jurisdiction of the court under the act of 1820, ch. 191, depends upon the allegations that the party died intestate of such an estate as is described in the act; that the parties entitled to such intestate's estate cannot agree upon a division; or that some of the parties are minors.
4. A formal application in such cases may be made by bill to the county court as a court of equity.



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5. Under the prayer for general relief, the complainants are entitled to such action of the court, and decree, as the case made in the bill would by law entitle them to.
6. As relates to the question of jurisdiction, no prayer for a partition or appointment of commissioners to divide and value was necessary.
7. Where the case made by the bill is within the jurisdiction of the court, neither the inappropriate averment that the land was incapable of division, nor a prayer for the appointment of a trustee to sell, would affect that question.

Where the bill made a case under the act of 1820, ch. 191, sec. 8, the court should pursue the provisions pointed out by that act, or it is error of procedure, but does not affect the jurisdiction of the court.

It is the allegations in a bill which confer jurisdiction, and determine the power of the court.

A course of procedure adopted by a court subsequent to the filing of a bill, decree without or upon insufficient proof, is error in the exercise of jurisdiction, but do not indicate a want of it.

The true test of jurisdiction will in all cases be found in the determination of the question, whether a demurrer will not lie to a bill.

Before the ratification of a sale in equity, all objections to it are open for consideration, and the sale will be set aside upon proof of error, mistake, misunderstanding, or misrepresentation as to the terms or manner of the sale. It must appear to be in all respects fair and proper, or it cannot receive the sanction of the court.

After the sale has been confirmed, and after the term has passed, and the proceedings are considered as enrolled, the court possesses no power to annul the same, except by bill of review for error apparent on the face of the decree, or by an original bill to annul the same for fraud.

Where bills are necessary to be filed to carry decrees into execution, the law of the decree is not examinable, and will be enforced, unless delayed or stayed for re-hearing of the former case, if not enrolled; or if enrolled, for a bill of review.

Upon a bill filed by the devisees of a purchaser, under a decree to sell real estate, to compel the trustee to make a conveyance, who refused to convey after ratification of sale and enrolment of the decree, it is error in the court to adjudge the decree erroneous and invalid, when it was within the jurisdiction of the court.

Where a bill was filed against infant defendants and others, under the act of 1820, ch. 191, to sell an intestate's real estate, upon the ground that the parties entitled could not agree upon a divisor thereof, and the land was ordered to be sold *irrespective of the directions of that act*, it is competent for the defendants to question the regularity or validity of the decree, either by a bill of review, or by an original bill for fraud.

So where a bill was filed to enforce a purchase under *such a decree*, and the defendants in the first proceeding contested the right of the complainants in the second to the purchase made by them, it is the duty of a court of equity to

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stay the execution of the first decree, until an opportunity might be afforded the defendants, within which they should be at liberty to file an original bill to set aside the decree for fraud, and to the infants, within which they might file a bill of review, to vacate the decree for errors apparent on its face, to effect which objects the cause was remanded after a reversal of a decree dismissing the bill in this cause.

Where the courts are authorized to sell real estate upon the application of parties under certain circumstances, by act of Assembly, and the act points out the various steps to be taken after filing the bill, as the appointment of commissioners, the procurement of their judgment upon the practicability of dividing the land, their valuation of it, and securing to the heirs-at-law in succession, the right of electing to take the estate at the valuation, the absence of such steps in the cause would, in *England*, be the subject matter of a bill of review where the decree recites the proceedings in the cause.

But here where the English practice of reciting the proceedings in the decree does not prevail, the proceedings themselves are the subject matter of revision in a bill of review, to the same extent, and in the same manner, as if they were stated on the face of the decree, in conformity to the *English* practice.

#### APPEAL from the equity side of *Alleghany* County Court.

The bill in this cause was filed on the 25th July, 1839, by the devisees of *Benjamin Tomlinson*, deceased, against *Gustavus Beall* and wife, and other heirs-at-law of the said *Benjamin*; and *Thomas J. McKaig*. It alleged in substance, that upon a bill theretofore filed in *Alleghany* county court by the said *Beall* and wife, against *Sampson Thistle* and others, some of whom were infants, at April term, 1836, a decree was passed for the sale of all the real estate of which *Jesse Tomlinson of Benjamin* died seized, or to which he was in any wise entitled. That *McKaig* was appointed trustee to make the sale, which was made to *Benjamin Tomlinson* for \$750, and duly ratified at October term, 1836. That the proceeds of sales were audited and distributed under orders of the court. That *Benjamin*, the purchaser, who resided on the land, died after the ratification of his purchase, before obtaining a deed, having devised his purchase to the complainants, to whom the trustee refused to make a conveyance, according to the terms of *Benjamin's* will, alleging that inasmuch as there was difference of opinion between the heirs of *B.* as to the construction of his will, and as to his heirs who were entitled

to the land, he preferred to occupy a neutral ground, and do nothing without the orders of the court in the premises. The bill also alleged the payment of the purchase money by *B.*, a willingness to pay any residue if any was due, and a fraudulent combination among the defendants to deprive the complainants of their devise under *B's* will. That the said *Gustavus Beall*, who is the author of most of the dissatisfaction which has been expressed, was one of the petitioners for the decree to sell the said lands; that he was active in getting the petition filed, and in conducting the proceedings to a decree; that he attended at the trustee's sale, and it is believed acted for the said *Benjamin Tomlinson*, deceased, in bidding in the said land for the said *Benjamin*, &c. That the sole object of getting the aforesaid decree to sell said lands, as understood in the family and amongst the heirs, &c. of the said *Benjamin*, was to enable the said *Benjamin* to get back the title to said lands in himself, (the said *Benjamin* having previously conveyed them to the said *Jesse*) in order that he, the said *Benjamin*, might devise the same by last will and testament, and that for this reason there was little or no competition at said trustee's sale, and that the sum bid was pretty much a matter of form, with a view to make good the purchase, &c. That if the whole purchase money was not paid (which your orators and oratrixes do not admit) by the said *Benjamin* in his lifetime, it was altogether owing to the main object and purpose for which the decree to sell was sought, it not being so much with a view to divide the proceeds of sale amongst the heirs of said *Jesse*, who are the children and heirs of the said *Benjamin*, as to reinvest the title to the lands in the said *Benjamin*, in order that he might dispose of them to his said children as he thought proper. That most of those entitled to the proceeds were indifferent about receiving any portion thereof, and your orators and oratrixes therefore allege, that under the circumstances the whole purchase money was in effect paid. But in order that there might not be even the shadow of foundation for any such pretences and allegations on the part of the said *Beall* or any other person, your orators and oratrixes

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further allege and charge to be true, that they have tendered to the said trustee the balance of the purchase money pretended to be due and unpaid, and that the said trustee refused to receive the same. The heirs-at-law of *Jesse Tomlinson* were the children and heirs of *Benjamin*, some of whom were infants and parties to both bills. The object of the present bill was to procure a conveyance from the trustee, *McKaig*, and the heirs of *B.*, who took no interest in the land under his will, and against them *subpœna* and relief were prayed.

With the bill a variety of documentary evidence was filed.

The proceedings in *Alleghany* county court upon the bill of *G. Beall and wife*, *Mury Tomlinson* and *Drucilla Baker* against *S. Thistle and wife*, *Jonas Beason and wife*, *Thomas, Mary Ann, Lavinia, Elizabeth* and *Samuel Collins*, and *Philip* and *Alexander Wingart*, showed that *Jesse Tomlinson* “died seized in fee, or entitled to an equitable interest or reversion in and to a large real estate in *Alleghany* county, to which the complainants and defendants in the cause were entitled as heirs-at-law.” That the said real estate would not admit of division amongst the parties entitled to the same, without great loss and injury to the heirs-at-law. That the *Collinses* and *Wingarts* were infants. Prayer for a sale and *subpœna*.

The infants, except *Thomas* a non-resident, answered the bill by guardian appointed under a commission from the court, admitted its facts, and consented to a decree as prayed.

The answer of *Beason and wife* also admitted the facts charged, and consented to a sale; and as to the absent defendants, the bill was taken *pro confesso* after publication, and a decree was passed for a sale on the 30th April, 1836, after proof of the heirship of the parties, and that the land was not susceptible of division amongst the heirs without loss.

The trustee, *T. J. McKaig*, reported a sale of “*Rural Felicity*,” 266 acres, “*Rockland*,” 46 acres, “*Stoney Ridge*,” 51½ acres, “*Poplar Hollow*,” 78 acres, “*Millstone and Coal*,” 28½ acres, for the sum of \$750, to *Benjamin Tomlinson* the highest bidder, which was finally ratified on the 18th October,



1836. The distribution of the proceeds of sale was also finally ratified on the 19th October, 1836.

At October term, 1840, the complainants amended their bill and introduced as a part of their case, a deed from *Benjamin Tomlinson* to his son *Jesse*, of the 1st March, 1828, in consideration of natural love and affection, also the better preferment of him the said *Jesse*, also for the payment of the charges thereinafter specified, and upon the condition and terms thereto annexed, conveying a tract of land called *Rural Felicity*, 266 acres, in fee, provided that he the said *Jesse*, his heirs and assigns would permit the said *B.* to enjoy the said tract during his natural life, which right the said *B.* had reserved for his support and maintenance, and that he the said *Jesse*, should pay to *Rebecca Beason* \$400, *Susanna Thistle* \$100, *Mary Tomlinson* \$150, at the expiration of five years, to be laid out in the education of *Lavinia Collins*. These sums were charged upon the said lands until paid, as well in the hands of the said *Jesse* as in the hands of his heirs.

By another deed of the same date with the former, between the said parties, in consideration of love and affection, and for the better preferment of the said *Jesse*, and in consideration of one dollar the said *B.* conveyed to him in fee, "*Rockland*" and "*Stoney Ridge*."

The charges of the amended bill in relation to these deeds, will sufficiently appear in the answer of *Beall and wife*.

The answer of *G. Beall and wife* to the amended bill admitted that the said *B. T.* did on the 1st March, 1828, execute a deed to the said *Jesse Tomlinson* for the tract called "*Rural Felicity*," for the considerations and upon the terms therein expressed; that the said *B. T.* did on the said 1st March, 1828, execute a deed to the said *Jesse Tomlinson*, for the tracts "*Rockland*" and "*Stoney Ridge*," for the consideration therein expressed. But these defendants deny that the said deeds or either of them are mere deeds in form, but in "substance a will" as alleged, or that it was ever the intention of the said *Benjamin Tomlinson*, either at the time the said deeds were executed, or at any time before his death, that the said

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deeds should be considered as a will, or as a testamentary distribution of the property as is alleged in the complainants' said amended bill. On the contrary, these defendants know from personal conversations with the said *B. T.* about the time the said deeds were executed, and they here aver the truth of the same, that the said *Benjamin Tomlinson* frequently said in the presence and hearing of these defendants, that he always intended that the said *Jesse*, his son, should have and receive the said tracts of land called "*Rural Felicity*," "*Rockland*" and "*Stoney Ridge*," specified in said deeds, and also all that part of the lands or real estate of the said *Benjamin*, which lay in the State of *Pennsylvania*, adjoining the said tract called "*Rural Felicity*," upon the terms and conditions so far as related to the said tract called "*Rural Felicity*," which are specified in the deed; and that the execution of the said deeds was but the fulfilment of his expressed intention of conveying the title and the interest in the said three tracts of land to the said *J. T.*, and to his heirs and assigns in fee forever, upon the conditions and with the reservations expressed in said deed; and that the execution and delivery of the said deeds to the said *Jesse*, his son, at the particular time they were executed and delivered, was for the further purpose of vesting the title and permanent interest in the said *Jesse*, to enable him to become a more responsible and sufficient security for this defendant, *Gustavus Beall*, in the loan of money which he was about to obtain, and did obtain from the Commissioners of *Alleghany* county.

These defendants further answering state, that they did in their answer to the complainants' original bill, and they do now here again deny that the said *Benjamin Tomlinson* purchased in the title of the said *Jesse* to the said lands at the trustee's sale, at the instance of this defendant, *Gustavus Beall*, or with the approbation of the rest of the family, or that the said purchase was made as a family arrangement, as alleged in the complainants' said amended bill, except in the manner and upon the understanding and terms specified in the answer of the defendants to the original bill, to which they refer this Honorable

court. And they aver that it is not true, that the said *Benjamin Tomlinson* intended to purchase the said lands so sold by the said trustee at the time the bill was filed, to procure a decree to have the same sold, and that it never was the intention of the said *Benjamin* to make such a distribution of the said lands by his last will as was therein made, until he was to do so, whilst in the agonies of his last sickness, by the machinations and undue influence of some of the said complainants.

The answers of *Philip* and *Alexander Wingart*, infants, defendants, relied upon their infancy, prayed the protection of the court and relief according to their rights. They insisted upon the validity of deeds of 1828, from *B.* to *J.*, and the inability of the court to consider them as testamentary papers; that the original decree of 1835, and proceeding under it, are void, and cannot divest their title as heirs-at-law, because it was not stated in the original bill that it would be for the interest and advantage both of the said infants and of the other person concerned, that the said land should be sold, nor is there any statement in said bill of such fact as is required by the act of 1785, ch. 72, sec. 12, to give the court power to decree a sale of said land of these defendants; and that if any of such statements had been made, it would have been untrue in point of fact. That the land was sold to *B. T.* at a sum grossly inadequate to its value, and with and under such circumstances, that it would be a fraud on their rights to decree a conveyance to the said complainants; that the trustee was induced to sell at the low price he did sell for by the misrepresentations of the said *B. T.*; that it was sold in pursuance of a family arrangement, and that the land was worth ten thousand dollars; that these defendants have not received any part of the proceeds of sales, and pray that the sale by *McKaig* may be set aside, &c.

The answer of *Thomas J. McKaig*, the trustee, alleged that on the day of sale, at the request of *B. T.* deceased, who became the highest bidder and purchaser, he offered all the real estate of the said *Jesse* mentioned in the report of sale together. This respondent was induced to do so, because he

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understood that the sale was made rather as a family arrangement to gratify *B. T.*, than for the purpose of realizing the value of the property. When the property was offered, *B. T.* bid five hundred dollars, and no person seemed disposed to bid against him, as it was understood *Mr. Tomlinson* wished to purchase the property. This respondent was unwilling that the property should be sold at that price, being merely nominal, and requested *Gustavus Beall*, one of the complainants in said cause, and defendant in this, so to inform *Mr. Tomlinson*, and to state to *Mr. Tomlinson* that this respondent did not believe the court would ratify the sale, unless the property was sold for something like its value.

This respondent does not now recollect whether there was any bid made by any other person than *Mr. Tomlinson*, but after *Mr. Tomlinson* was informed that this respondent was unwilling to sell the property at five hundred dollars, he bid seven hundred and fifty dollars, and the property was sold to him at that price. Owing to the high respectability of *Benjamin Tomlinson*, and the representation made to this respondent by *B. T.* and *G. B.*, the only persons interested with whom he had any conversation of the object of the sale, this respondent was induced to let the property be sold at that price. If this respondent had refused to have sold the property at seven hundred and fifty dollars, as he certainly would have done under any other circumstances, it would have been said by *Mr. Tomlinson* and others, that the object of the trustee was only to increase the amount of his commissions. This respondent might, it is true, have required *Mr. Tomlinson* to have bid a sum equal to the value of the property sold, or refused to sell; but this respondent believes few persons at that time would have given him credit for anything more than guarding his own interest or swelling the amount of his own commissions, as *Mr. Tomlinson* told this respondent at the time of the sale he would procure releases from all those interested. This respondent believes that *Gustavus Beall* at the time or previous to the sale, requested that the tract of land called "*Millstone and Coal*," lying on *Jennings' Run*, should



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be sold separately, but *Mr. Tomlinson* asked to have it all set up together, to which this respondent assented. *B. T.* never executed his bond or bonds to this respondent for the purchase money according to the terms of the decree, nor did he ever pay any money to this respondent on account of said sale, except the commissions and costs which he paid through *Gustavus Beall*. This respondent called upon *G. B.* who at that time transacted the most of *Mr. T.*'s financial concerns, and desired him to obtain from *Mr. T.* his bonds for the purchase money, but this respondent was informed by *Mr. Beall* that *Mr. T.* intended to get the receipts or releases of the heirs for the amount audited to each as soon as that amount was ascertained. This respondent therefore proceeded to have the sale ratified, as the proceedings in said cause will show, and after the audit was made and ratified this respondent called upon *Mr. T.* to furnish him with the releases according to his promise. In 1837, *Mr. Tomlinson* procured this respondent the releases filed in the cause, to wit, the releases of *Jonas Beeson* and wife, *Sampson Thistle* and wife, *Cincinnatus J. Neall* and wife, and *Thomas Collins*, and with none other. Not having furnished the releases or receipts of those entitled to a distributive share of said estate, nor paid any part of the purchase money, except commissions and costs in his lifetime, this respondent did not execute a deed for said property to the said *B. T.* This respondent cannot say whether he was informed that the heirs would execute releases, or whether the releases or the receipts filed were obtained with or without the payment of the money by *Mr. Tomlinson*, as he was not present at their execution; but after the death of *Mr. Tomlinson*, *Mary Tomlinson*, one of the complainants, through *Andrew Bruce*, deceased, then one of the executors of *Benjamin Tomlinson*, notified this respondent that she would not release or give a receipt unless the money was paid to her, and that she would look to this respondent for the amount audited to her, but she is the only heir who has given this respondent that notice, or who has made any demand on this respondent for any part of the purchase money distributed by the auditor's

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report in the cause filed. By agreement, being exhibit "F" of complainants, the money by said report due the remaining heirs whose receipts have not been filed, is considered as tendered to this respondent by *Samuel M. Semmes*, attorney for complainants, and a deed was demanded as alleged in the complainants' bill of complaint. This respondent being of the opinion he had no authority under the decree aforesaid to execute a deed to the devisees under the will of the said *B. T.*, and to the uses in said will contained, with remainder over to the right heirs of *Samuel Tomlinson Collins*, as was required of this respondent, and that a deed thus executed by this respondent without the further order or decree of this court, would be inoperative and void, refused to execute the said deed to the complainants; but upon receiving the purchase money yet due, or the releases or receipts of those entitled to distributive shares under said report, this respondent as trustee aforesaid is prepared to execute any deed this court may direct, or to obey and carry out any other or further decree which this court may make in the premises.

The other answers are not considered material by the reporter.

There was proof that *Rural Felicity* was worth from \$6,000 to \$10,000, of the value of the improvements on it, and absence of all competition at the sale, where it was understood *Mr. B. T.* desired to repossess himself of the property.

At October term 1845, the *Alleghany* court (*MARTIN, C. J.*) delivered the following opinion and decree.

It appears in this case, that *Jesse Tomlinson* of *Alleghany* county died in July, 1835, seized in fee simple of certain real estate, and leaving as his heirs-at-law *Rachel Beall*, the wife of *Gustavus Beall*, *Mary Tomlinson*, *Drucilla Baker*, *Susanna Thistle*, the wife of *Sampson Thistle*, *Rebecca Beeson*, the wife of *Jonas Beeson*, *Thomas*, *Mary Ann*, *Lavinia*, *Elizabeth* and *Samuel Collins*, and *Philip* and *Alexander Wingart*, the infant children of two of his deceased sisters.

Three of the tracts of land that constituted the real estate to which *Jesse Tomlinson* was entitled at the time of his death,

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had been acquired by him from his father, *Benjamin Tomlinson*, by the deeds of the 1st March, 1828, the remaining tracts in some other mode.

On the 11th September, 1835, *Gustavus Beall* and his wife filed their bill in *Alleghany* county court as a court of equity, against the other heirs-at-law of *Jesse Tomlinson*, among whom were the infant children of his sisters, *Mrs. Collins* and *Wingart*, praying that the court might order a sale of the real estate of the said *Tomlinson*, on the ground "that it would not admit of division amongst the parties entitled to the same, without loss and injury to the aforesaid heirs-at-law." The bill states, "that *Thomas*, *Mary Ann*, *Elizabeth* and *Samuel Collins*, and *Philip* and *Alexander Wingart* are infants, under the age of twenty-one years." And prays "that a trustee may be appointed by a decree of the court to sell the said real estate, and that the money arising from the sale may be distributed among those entitled to it by law, under the direction of the court."

On the 30th April, 1836, a decree was passed by the court appointing *Thomas J. McKaig*, Esq., trustee, and directing a sale of the estate in conformity with the prayer of the bill.

In May, 1836, the property was sold by the trustee to *Benjamin Tomlinson*, the father or grandfather of the parties interested in its proceeds, as the highest bidder, for the sum of \$750, and the report of the trustee after the usual order *nisi*, was finally ratified at the October term of the court, 1836.

On the 26th September, 1838, *Benjamin Tomlinson* a few days previous to his death, made his will and devised the estate which he had purchased from the trustee, and which he had conveyed to *Jesse Tomlinson*, to his daughter *Mary* for life, with remainder in fee to his grandson, *Samuel Collins*, and the rest of his estate by a residuary clause, to be distributed among his legal heirs.

On the 25th July, 1839, the bill which is now the subject of examination was filed by the devisees of *Benjamin Tomlinson*, against all the heirs-at-law of *Jesse*, who were not complainants, in which they aver their readiness to pay to the trustee or

bring into court so much of the purchase money as may not have been paid by *Benjamin Tomlinson*, and having incorporated into the bill the decree and proceedings under which the sale of the estate of *Jesse* was made, pray that the trustee may be ordered to convey the property thus sold by him in conformity with the provisions of the will of *Benjamin*.

It will be perceived that the decree of the 30th April, 1836, in virtue of which this sale was made, was a proceeding under the 12th sec. of the act of Assembly, 1785, ch. 72. It provides "that in case any infant have a joint interest in common with any other person or persons in equal or unequal proportions in any lands, and it shall appear to the Chancellor upon the application of any of the parties concerned, and upon appearance of the infant and hearing and examination of all the circumstances, that it will be for the interest and advantage both of the infant and of the other person or persons concerned, to sell such lands or any part thereof, the Chancellor may order and direct such lands to be sold upon such terms as the Chancellor shall direct, always taking care that a just proportion of the money arising from such sale be well and sufficiently secured to be paid to such infant."

The right of the Chancery court to direct the sale of an estate to which infants are entitled, is a statutory grant of power, and can only be exercised where it shall have been made to appear to the Chancellor that such sale will be for the interest and advantage of the infant, and other persons concerned; and I think it a fatal objection to the validity of the decree under which this sale was made, that the bill did not on its face, show a case wherein the jurisdiction and power of the county court, as a court of equity, existed.

It is a fundamental rule of universal application, that the bill must by direct and precise averments present a case within the appropriate jurisdiction of the court. The Chancellor must look to the bill for his jurisdiction, and if on inspection he does not find it there, he has no power to decree. His jurisdiction stands upon the pleadings, and therefore a fact though proved, will not obviate the necessity of making in the bill



those averments upon which the jurisdiction of the court depends.

In *Shriver vs. Lynn*, 2 *How.* 58, the court held, that the decree of the Chancellor could not be impeached in a collateral suit, because he had jurisdiction as presented by the petition.

In *Grignon against Astor*, 2 *How.* 338, the same court declared "That if the petitioner presents such a case in his petition that—on a demurrer the court would render a judgment in his favor—it is an undoubted case of jurisdiction." The converse of this rule must be true. And if the bill presents such a case, that on a demurrer the judgment would be against the complainant, it is conclusive upon the question of jurisdiction.

In the case of *Griffith against The Frederick County Bank*, the Court of Appeals say—"the Chancellor has no jurisdiction under the act of 1785, ch. 72, to decree a sale of the real estate, except upon the condition therein mentioned. And this court have said: that the exercise of such a jurisdiction must be warranted both by the pleadings and the proof, or the decree cannot be sustained." Does then the original bill of the 11th of September, 1835, present on its face, a case in which the court had jurisdiction or power to direct the sale of an estate where infants were concerned, according to the provisions of the 12th sec. of the act of 1785, ch. 72?

It is clear that it does not. The bill only alleges, that the estate will not admit of division without great loss to the heirs at law, and therefore asks for a sale of it. But it is manifest that the court had no power to decree a sale of the real estate, except upon the conditions mentioned in 12th section of the act of 1785, ch. 72. That is, upon its appearing to the court, after hearing and examination, not that the estate would not admit of division, but that a sale of it "would be for the interest and advantage of the infants, and other persons concerned." I think it perfectly clear, that on a demurrer to this bill, it must have been sustained, and the bill dismissed, on the ground that it did not present a case of jurisdiction.

Another objection equally fatal to the power of the court to

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pass their decree for the sale of the lands in question, is, that no proof was taken that such a sale as was prayed for by the bill would be for the interest and advantage of the infants. A commission was issued, and testimony taken under it, but the evidence was directed only to the point, that the estate would not admit of division. That the Chancery court has no power to decree a sale of real estate in which infants are interested, unless some evidence is taken, calculated to show, that the interest of the infants would be promoted by such sale, under the provisions of the statute under which the court acted in this case, was directly decided by the Court of Appeals, in the case of *Harris* against *Harris*, 6 *G. and J.* 114. They say: "we see no ground for reversing the decree of the Chancellor in this case. If required to pass a final decree therein, he could not have done otherwise than dismiss the complainant's bill."

The only evidence that a sale of the lands in question would have been for the benefit and advantage both of the infants and other person or persons concerned, (which, without being made to appear to him, he possessed no power to decree a sale,) was the admission in the answer of the infant defendants: such admission is not binding upon these infants. And before the Chancellor could pass the decree prayed for, he must be satisfied of the truth of the material allegations in the bill; that is, that a sale of the estate would be for the advantage of the infants, by other means than the answer of the infants.

It has, however, been maintained by the counsel for the complainants, that although this decree may have been reversed by some direct proceeding, either in the same court to vacate it, or in the appellate court; yet the time having passed within which an appeal could be taken from the decree, or a bill of review filed to reverse it, it is to be held as practically conclusive.

It is true that a bill of review for errors apparent upon the face of the record will not lie, after the time when a writ of error or appeal could be taken; for although bills of review are not strictly within the statute of limitations, courts of equity govern themselves in this respect, in analogy to the proceeding adopted in the common law courts. Therefore it has been

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determined by the Supreme Court, in analogy to the provisions of the judiciary act concerning appeals, that a bill of review cannot be filed after five years. *Thomas against Harbie*, 10 *Wheat*. 146.

The Court of Appeals have decided that a bill of review will not lie after nine months, that being the time fixed by the act of Assembly, limiting appeals from decrees and orders of the Court of Chancery. But they say, when the party interested labors under the disability of coverture, a bill of review may be filed within nine months after the disability is removed. *Berrett against Oliver*, 7 *G. & J.* 207. And in *England*, where twenty years have elapsed from the time of pronouncing the decree, the court will not permit a bill of review to be brought. *Smith against Clay*, 3 *Bro. C. C.* 633, in note. But it is well settled that time shall not be objected as a bar to a bill of review, against any person under the disabilities specified in the statute of limitations: and therefore in *England*, the court allowed an infant, after twenty years had elapsed, to exhibit a bill of review, and reversed a decree which was to the prejudice of his interests. *Coop. Eq. P. C.* 93.

A case strikingly similar in many of its features to the one now under consideration, was decided by the Supreme Court, at the January term, 1834. *Bank of the United States against Ritchie*, 8 *Pet.* 128.

*The Bank of the United States* filed their bill against the infant heirs of *Abner Ritchie*, a debtor of the bank, for the purpose of selling his real estate, on the ground of insufficiency of the personal estate, under the *Maryland Statute of 1785, ch. 72*. An answer was filed by the guardian *ad litem* of the infants, in which the justice of the claims, and the insufficiency of the personal estate, were admitted: but those facts were not established, otherwise than by the answer of the guardian. On the 21st of June, 1826, a decree was passed by the court, directing the sale of the real estate of *Abner Ritchie*, for the purpose of paying the debt of the complainants, and a trustee appointed. A sale of the estate was accordingly made by the trustee, and a deed executed to the purchaser. In 1828, some

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of the infant heirs of *Abner Ritchie*, filed their bill of review, in which they assigned various errors in the original suit, and in the decree, and prayed that the same might be reviewed and reversed; and that the decree made by the trustee might be declared void, and the sale made by him set aside. The court below reversed and annulled the decree, and declared the sale, and deed made by the trustee, void. This decree was affirmed by the Supreme Court. Various errors were stated as existing in the proceedings and decree of the court; but a prominent objection was, that a decree had been passed directing the sale of the real estate, without any evidence, except as derived from the answer of the guardian of the justice of the claim of the complainants, or the sufficiency of the personal estate. *Chief Justice Marshall*, in delivering the opinion of the court, says: "In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court."

I think, therefore, that it would be the duty of the court, upon a bill of review filed by these infants, to reverse the decree of the 30th of April, 1836, and set aside the sale made by their trustee.

Upon this ground, I shall direct the bill of the complainants to be dismissed. I cannot order the trustee to consummate a sale, made in pursuance of a decree, which in my opinion, the court had no power to pass.

The views, thus expressed, render it unnecessary to decide upon the propriety of the sale. I may say, however, that if the decree had been free from objections, the only difficulty I should have felt in sustaining the sale, would have been that it was a case in which the interests and rights of infants were involved.

It is now firmly established that the court will not set aside a sale, in all other respects unexceptionable, for mere inadequacy of price. In *Glenn against Clapp*, 11 G. & J. 9, the Court of Appeals say: "the court will not set aside a sale, in all other respects unexceptionable, for inadequacy of price, unless the sum reported by the trustee is so grossly inadequate



as to indicate a want of reasonable judgment and discretion in the trustee. But where other just cause appears to doubt the propriety of the sale, it is a consideration very proper to be viewed in connection with it, that the sale has been also made at a reduced price." In this case the court vacated the sale, but exceptions to it had been filed after the order *nisi*, and before its final ratification. This was also the predicament of the case of *Williamson against Dale*, 3 *J. Ch. Rep.* 290.

As a general principle for the government of courts in reference to these judicial sales under the authority of the court, and of which the court is the vendor, I would adopt the rules stated by *Lord Eldon* in *Morsci against the Bishop of Durham*, 11 *Ves.* 57, and *White against Wilson*, 14 *Ves.* 151, that after the sale has been confirmed it shall not be disturbed, unless in addition to the inadequacy of price there has been something unfair or unconscientious on the part of the purchaser. If in the case before me, the only parties whose interests were involved had been adults, and the decree had been unexceptionable, I should have held their silence and acquiescence for two years after the report of the trustees finally ratified, and new rights had intervened by the death of the purchaser, as conclusive evidence, either that they had originally assented to the terms under which this property was sold, or that they had subsequently adopted them, I would not have disturbed the sale at their instance. But the whole aspect of the case is changed, when it is seen that it is one in which the rights of infants are directly involved; from their silence and apparent acquiescence no unfavorable inferences can be drawn, and whatever may have been the hopes and expectations of *Mr. Tomlinson*, their infancy shows conclusively, that they never could have consented to the terms upon which it is said, that their estate was sold to him by the trustee. I think, however, that apart from any questions connected with the propriety of the sale, that the bill must be dismissed.

Whereupon, it is this 6th day of October, eighteen hundred and forty-five, adjudged, ordered and decreed by *Alleghany* county court, as a court of equity, that the bill of complaint of

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*Mary Tomlinson, Alexander King and Lavinia his wife, Thomas Collins, Elizabeth Collins, Cincinnatus J. Neale and Mary Ann his wife, against Thomas J. McKaig, Gustavus Beall and Rachel his wife, Drucilla Baker, Jonas Beeson and Rebecca his wife, Sampson Thistle and Susanna his wife, Philip Wingart, Alexander Wingart, and Philip Wingart, Senior, be and the same is hereby dismissed with costs.*

From this decree the complainants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By PEARRE for the appellants, and

By F. A. SCHLEY and T. J. MCKAIG for the appellees.

ARCHER, C. J., delivered the opinion of this court.

By the decree of *Alleghany* county court as a court of equity, passed on 30th October, 1836, certain lands in the proceedings mentioned were decreed to be sold. The trustee appointed to sell the same reported his sale to the court, which sale was ratified *nisi*, and at October term of said court was finally ratified and confirmed. The purchaser by his last will and testament devised the lands thus purchased to the complainants in this cause, as they allege, who pray that the trustee may be decreed to convey to the devisees under the will of the purchaser. The decree which it is thus proposed to be carried out, stands unappealed from, and unreversed.

This application is resisted on various grounds, which we shall proceed briefly to examine.

First, it is contended that the court which passed the decree had no jurisdiction of the case in which they did decree, and that if this be true, the court below were right in refusing to execute the decree.

If the bill filed in the cause in which the decree passed be considered as founded on the act of 1785, ch. 72, the jurisdiction of the court certainly could not be sustained, because there is no allegation in the bill that it would be for the interest and advantage of the infants and of the other persons con-

cerned, that the lands described in the bill should be sold. Such an averment is necessary to give the court jurisdiction under this act.

The enquiry will then be whether the jurisdiction of the court is maintainable under the act of 1820, ch. 191. That act declares in its 8th section that if the parties entitled to an *intestate's* estate cannot agree upon the division thereof, or in case *any person entitled to any part be a minor*, an application shall be made to the county court of the county where the estate lies, when it becomes the duty of the court to appoint commissioners, who having qualified as prescribed by the act, are to perform the duties particularly set forth in the act, and if their judgment shall be confirmed by the county court, then rules are prescribed for the heirs to take the property by election, and if all refuse the property is to be sold, and the proceeds distributed among those entitled thereto.

By this act no allegation is necessary in the application to the court, that proceedings under this act would be for the benefit and advantage of the parties concerned; but the action of the court is demanded upon the allegation that the party has died intestate of such an estate as is described by the act, that the parties entitled to the intestate estate cannot agree upon a division thereof, or that some of the parties are minors.

That a formal application to the court may be made by bill to the court as a court of equity has been heretofore decided by this court.

The allegation in this bill conforms to the act of Assembly just adverted to, it avers that *Jesse Tomlinson died intestate* of lands *held in fee simple* by him, that they descended to his heirs-at-law who are particularly specified, two of whom are minors, and the bill prays general relief, *and such other and further proceedings as may be necessary.*

The above allegations, in our judgment, brought the case within the provisions of this act, and gave the court jurisdiction of the cause. The complainants were entitled under the prayer for general relief, and further proceedings, to such action of the court and decree, as the case made in the bill

would by law entitle them to. That they did not specifically pray for a partition, or for the appointment of commissioners to divide and value the land, is immaterial; as far as it relates to the question of jurisdiction, their prayer for general relief, and further proceedings, was sufficient. Nor is it material to the case that the complainants assumed that the land was incapable of division, and that there was a specific prayer for the appointment of a trustee to sell the lands. The one may have been an inappropriate averment, and the other an inappropriate prayer, for such a case; but they will not vitiate averments which confer jurisdiction, or affect a prayer for general relief, which always justifies the ultimate action of the court thereupon in pursuance of the case made by the bill.

The court, however, in its action upon this bill, did not pursue the provisions pointed out by the act of 1820, ch. 191, and its proceedings therein are no doubt erroneous. But the concession of this fact does not touch the question under consideration. It is the allegations in the bill which confer jurisdiction, and which are to determine the power of the court. If the steps taken by the court subsequent to the filing of the bill are not justified by law, or if they decree without proof or upon insufficient proof, that is error in the exercise of jurisdiction, but does not indicate a want of jurisdiction.

It has been properly said that the true test of jurisdiction will in all cases be found in the determination of the question whether a demurrer will lie to a bill.

If this be so, neither the erroneous action of the court after the filing of the bill, nor defective proof could affect the question of jurisdiction.

In this view of the subject it is unnecessary for us to determine, whether if the county court had no jurisdiction to pass the original decree, it would be competent for the same court to refuse an application to execute such decree. Again, it is urged that if the court had jurisdiction to decree, still on an application to carry out the decree, the court will look to all the circumstances attending the sale, and will refuse to execute the decree if they find that fraud or surprise exists. Before



the ratification of a sale made by authority of the Chancery court, all objections to a sale are open for consideration, and the sale will be set aside upon the proof of error, mistake, misunderstanding or misrepresentation as to the terms or manner of the sale. Before ratification, the sale must appear to be in all respects fair and proper, or it cannot receive the sanction of the court. But it is equally true that after the sale has been confirmed, and after the term has passed and the proceedings are considered as enrolled, the court possesses no power over its decree to annul the same, except by bill of review for error apparent on the face of the decree, or for some new matter discovered since the decree, or by an original bill to annul the same for fraud. Sometimes bills are necessary to be filed to carry into execution decrees, and the bill and proceedings now before us are of that description. In such cases the law appears to be as settled by the later English cases, both in Chancery and on appeal, that the law of the decree is not examinable; and that the law of the decree will be enforced unless delayed or stayed for a rehearing of the former cause if not enrolled, or if enrolled, for a bill of review, *Mitford Plead*:—and the cases there cited.

If this be the law as applicable to such a case, then the decree appealed from must be erroneous, as the court below has dismissed the bill of the complainants without examining the complainants' right to stand in the place of the purchaser, and in assuming the error and invalidity of the decree which is sought to be enforced.

That a right exists on the part of the infant defendants to the original bill, to question its regularity and validity, either by a bill of review, or an original bill to vacate the same for fraud, cannot be doubted; and we think the court below should have stayed the execution of the decree until an opportunity might be had of testing the validity of the original decree by an original bill, to be filed by the defendants for that purpose.

The regularity of the proceedings after the filing of the bill in the original case, has not been attempted to be vindicated. Not one of the steps demanded by the act of 1820, ch. 191,

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have been taken, no order or decree for a commission was passed, of consequence no judgment of commissioners was had, or confirmation of such judgment; no privilege of election was extended to the heirs-at-law, without which the final decree of the court could not have been the legal exercise of jurisdiction.

That such matters would have been the subject of a bill of review in an English Court of Chancery, if a decree had there been passed under such a law, could not be questioned. In that tribunal the proceedings in the cause are recited in the decree, and such errors would, therefore, have appeared on the face of the decree, and would have constituted errors which the court would have noticed on a bill of review.

In this State the English practice of stating the proceedings in the decree has not prevailed, and to make the bill of review as effective as it is in the English Court of Chancery, the proceedings in the cause should be the subject of revision on a bill of review in the same manner as if they were stated on the face of the decree. Unless such an examination was allowable, few cases would occur in which bills of review could effect the object intended to be attained by them; for as the proceedings are not stated on the face of the decree, few errors which would on such a bill be the subject of review in the English courts could be reached. We accordingly find in 8 *Peters*, 128, the Supreme Court reversed a decree on a bill of review passed by the circuit court for the county of *Washington*, in the *District of Columbia*, where the same practice of framing decrees exists as here; and in the opinion of the court on the reversal of the decree, several errors were adverted to which did not appear in the body of the decree.

In the case of *Hollingsworth and McDonald*, 2 *H. & J.* 238, this court say that nothing appears *in the proceedings* on the first bill, to support the position that there is error apparent on the decree, and the court advert to the fact, that certain deeds which were the foundation of the proceedings then before the court, were not made a part of the proceedings in the original suit, clearly intimating, as we think, that had such deeds appeared *in the proceedings*, they could be noticed on a

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bill of review, although they had not been adverted to in the decree.

The same principles are sanctioned by this court in the case of *Hunter vs. Hatton and wife*, where the court say, that certain errors existing in an equity proceeding might be examinable by a bill of review. These errors were such as according to our practice would not appear in the decree.

In *Birch & Scott, 1 G. & J.*, this court announce the rule to be that a bill of review will only lie for errors apparent on the face of the decree, or for some new matter discovered since the decree. In thus saying, this court but announce the English rule. They were not called upon to apply it to our peculiar practice in framing decrees. We can alone reap the beneficial fruits of the English rule by causing the bill of review to reach such proceedings in the cause as would, according to the English practice, appear on the face of the decree.

We are accordingly of opinion, that the decree of *Alleghany* county court be reversed; and that the cause be remanded to that court, that by an order of said court to be passed on the application of the parties, time be given to the defendants, within which they shall be at liberty to file an original bill to set aside the decree for fraud, and to the infants, within which they may file a bill of review to vacate the decree for errors appearing on the face of the decree, and that in the meantime all proceedings in the present suit be stayed; and should either of the said bills be filed within the time allowed by the county court for that purpose, that proceedings in this suit be further stayed until the action of the court shall be had on the bill so filed.

DECREE REVERSED WITH COSTS, AND CAUSE REMANDED.

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Frantz vs. Smith.—1847.

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JONATHAN FRANTZ vs. LEONARD SMITH, *Executor of SAMUEL CODDINGTON*.—*December, 1847.*

In an action upon a bond, reciting the rendition of a judgment, from which the obligor, the defendant, was about to sue out a writ of error, with condition to transmit the record, &c., and prosecute the writ with effect, the defendant pleaded general performance, and the plaintiff assigned breaches in the words of the condition. The plaintiff need not produce in evidence the record of the original judgment.

The plea of general performance, in such case, affirms the existence of the judgment.

The condition of a writ of error bond recited, a judgment against the obligors for a sum certain, but was silent on the subject of interest, the judgment upon being produced in evidence, was for the same sum with interest; upon proof that the bond was filed in that cause, and there was no other cause between the parties at that term, *Held*, no variance.

APPEAL from *Alleghany County Court*.

This was an action of debt, brought by the appellant on the 6th March, 1843, against *Daniel Raymond, John Williams, Jacob Clammer* and *Samuel Coddington*, upon a bond, to appellant reciting the recovery of judgment in said county court by him, against the said *D. R.* for the sum, &c., upon which he was about to sue out a writ of error to the then next Court of Appeals, with condition, that if he should not send up a transcript of the record within the time required by law, prosecute the same with effect; and also satisfy and pay the said appellant, in case the said judgment should not be affirmed, all damages, &c. Then, &c.

To the writ, *John, Jacob, and Samuel* appeared. But afterwards, upon the death of *Samuel*, the appellee, his executor appeared in the cause, and severed in his defence to the action pleading, after oyer, general performance of the condition of the bond by *D. R.*

The plaintiff replied to this plea in the words of the condition of the bond, alleging that the said *D. R.* did not perform any or either of the acts therein mentioned.

To this replication there was no rejoinder; but a jury was sworn, who found a verdict for the defendant.



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**1ST EXCEPTION.** The plaintiff to support the issue on his part joined, offered in evidence the bond set out in the pleadings in this cause, and offered to prove that the said *Daniel Raymond* filed the bond now offered in evidence in a case in *Alleghany* county court between the said *Raymond* and the said *Jonathan Frantz*, and sued out a writ of error in said cause to the Court of Appeals for the *Western Shore*, and that he did not prosecute said writ with effect, and here rested his case.

The defendant thereupon moved the court to instruct the jury that the plaintiff was not entitled to recover without producing the judgment in the recital of said bond mentioned, or a copy thereof as evidence of his claim, which motion and instruction the court (MARTIN, C. J., and MARSHALL, A. J.) granted, and so instructed the jury. The plaintiff excepted.

**2ND EXCEPTION.** The plaintiff then offered in evidence the judgment in the case of *Daniel Raymond*, appellant, vs. *Jonathan Frantz*, appellee, as follows, to wit:

“By *Alleghany* county court, October Term, 1840.

No. 3 APPEALS.

DANIEL RAYMOND	}	19th. Jury sworn, trial, and ver-
vs.		dict for appellee. Judgment affirmed
JONATHAN FRANTZ.	}	for appellee for \$25 00, with interest
		from 6th day of May, 1839, and costs before Justice \$7 25,
		and court costs \$24 35, costs last term \$5 10.

Appellant's costs, . . . . . \$19 98

Record, . . . . . 3 40

Dec'r 18th, 1840, bond filed. Dec'r 26th, 1840, writ of error.

*Fi. fa.* to A. C., 1841, No. 35.

True copy—test,

AZA BEALL, *Clerk.*”

And offered to prove that the bond aforesaid was filed by the said *Daniel Raymond* in said cause, and there was no other judgment or cause at that term between the parties aforesaid in *Alleghany* county court, and a writ of error sued out thereon to the Court of Appeals for the *Western Shore*—that the

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Court of Appeals dismissed the said writ of error, the said certificate being received by agreement as sufficient to prove the fact of such dismissal.

The defendant by his counsel objected to the offering the said judgment in evidence because of a variance, the said judgment bearing interest from the sixth day of May, 1839, and it is not stated in said bond from what time the judgment mentioned in said bond bears interest, which objection the court (MARTIN, C. J., BUCHANAN and MARSHALL, A. J.) sustained, and refused to let the said judgment be offered in evidence on account of said variance. The plaintiff excepted and prosecuted this appeal.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE and MAGRUDER, J.

By T. J. MCKAIG for the appellant, who insisted

1st. That the judgment of the court below was wrong in the first bill of exception, as the bond entitled the plaintiff to recover the \$25, recited in it, without showing the judgment, because the bond showed the amount of the judgment, and admitted it.

2nd. Because if the appellee meant to deny that there was any such judgment, he ought to have craved oyer of the bond, and pleaded *nul tiel record*; instead of which, he took issue on the replication, which alleged he had not transmitted the record to the Court of Appeals, and did not prosecute the writ with effect, nor pay the appellant. The record states, that the appellant at the trial proved, that he did not prosecute the writ with effect—and this was proving the issue joined in his favor. There was no necessity to show the judgment, because he had recited it in his bond.

3rd. This case is distinguishable from the case of *Doogan vs. Tyson*, 6 *Gill & Johns.*, 459, because the variance in that case appeared on the face of the pleadings, here it does not.

4th. That the judgment of the court was wrong in the second bill of exceptions, because there was no variance

between the judgment recited in the bond and the judgment offered in evidence.

5th. There is no variance in the pleading. The proof is, that the appellee filed his bond in the case—sued out a writ of error, which was dismissed. The only question on this issue is: did he prosecute the writ with effect?

6th. The case would have been different, if this had been a suit on a sheriff's bond, where the cause of action not appearing on the face of the bond, it had to be set out in the replication.

7th. To allow the appellee to say, that he had not given a sufficient description of the judgment, in the case in which he filed his bond, would be to allow him to take advantage of his own wrong.

8th. The question is not, whether he has given a wrong description of the judgment in the bond—but, whether he has described the judgment as fully as he ought? It is insisted the description is sufficient—being accurate as far as it undertakes to describe it.

By C. McLEAN for the appellee.

This is a suit instituted by the appellant against the appellee, and others, on an appeal bond. There was a plea of performance and replication, setting out the breaches, though the record does not show what issue was joined. The case, however, went to trial, and it was contended that the appellant was not bound to produce the judgment, in support of the issue on his part. The court, however, determined otherwise, and this is the question presented by the first exception.

When the judgment was produced, it appeared that there was a variance, and how far that variance affected the plaintiff, is the question presented by his second exception.

The court having decided against the plaintiff on both points, and the verdict and judgment being for the defendant, he has taken this appeal.

It will be contended for the appellee:

1st. That the plaintiff, to sustain the issue on his part, was bound to produce the record.

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2nd. That the variance between the judgment produced, and that described in the bond, was fatal.

3rd. That although no issue may have been made up, yet as there is enough in the record to show that the plaintiff cannot recover on a proper state of pleadings, the cause ought not to be sent back.

MAGRUDER, J., delivered the opinion of this court.

This is an appeal from a judgment of *Alleghany* county court in favor of the defendant, in an action brought by the appellant. The suit was upon a bond in which the testator of the appellee was a security. It recites a former judgment against another person, the principal obligor in the bond, and a writ of error obtained to remove that judgment to the Court of Appeals. The condition of the bond is in the usual form of bonds of that description.

The defendant, after craving oyer of the bond, &c., pleaded performance of the condition, and the plaintiff in his replication set forth as the breaches of the condition of the bond, that the defendant did not cause to be transmitted within the time required by the law, a transcript of the record; did not prosecute the writ of error with effect; and has not paid and satisfied the judgment of the county court, &c. It appears by an agreement filed in the case, that issues were joined.

The plaintiff in the course of the trial took two bills of exception, and these inform us what are the questions, which in this case, we are to decide.

It appears by the first exception, that the court below instructed the jury, that in this suit the plaintiff was not entitled to recover without producing the judgment in the said bond mentioned, or a copy thereof, as evidence of his claim: this court decided otherwise in the case of *Lloyd vs. Burgess*, December term, 1846. A plea which would deny the existence of that judgment without denying the bond which recites it was inadmissible in the case, because as the court in *Lloyd vs. Burgess* said, it would deny "a fact which the defendant's intestate (testator in the case before us) has expressly admitted under his hand and seal in his bond."



It is true that neither the record, nor the agreement of counsel, tell us what were the points in issue; but in this case, there could have been no issue joined, which required the introduction by the plaintiff of this testimony. The defendant did not deny the existence of the judgment, but pleaded that he had in all respects performed the condition of the bond, and the existence of the judgment was thereby affirmed. The evidence ought to be confined to the points in issue. The issues must have been confined to the breaches charged in the plaintiff's replication, and the production by the plaintiff of the original judgment could not have been necessary; although all the breaches assigned by him had been denied by the defendant, the latter could only have rejoined that he had transmitted within the time required by law, a transcript of the record—that he had prosecuted his writ of error with effect—that the judgment, &c. had been satisfied, or had been reversed; but these rejoinders could present no issue, which required the plaintiff to prove the original judgment in order to recover damages upon any one of them. The court therefore erred in giving this instruction.

The plaintiff being required by the above instruction to produce the judgment spoken of in the bond upon which this suit was brought, offered in evidence a judgment of *Alleghany* county court, corresponding with the recital in the bond, except that in the former, the judgment is to bear interest, and in the latter, nothing is said about it.

It is stated in the bill of exceptions, that the bond was filed in that case, and that there was no other judgment or cause at that term between the parties. To this testimony no objection was made, except because of the variance in regard to interest. The question then is, whether because of this single variance, the judgment stating, and the bond omitting to state, from what time the judgment was to bear interest, the original judgment was admissible in evidence? There was certainly evidence tending to prove that this was, the very judgment, to remove which, the bond was executed.

In *1st Term Reports*, 239, the declaration in an action for

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bribery stated, that the precept was directed to the *Mayor* only. The precept produced at the trial was directed to the *Mayor* and *Burgess*. It was considered sufficient.

In 2 *Camp*. 525, the declaration stated that the *fi. fa.* was directed to *A. B.* and *C. D.*, sheriffs of *Middlesex*, and the writ when produced was directed to the sheriff of *Middlesex* generally; it was holden to be no variance, *A. B.* and *C. D.* being at the time sheriffs of *Middlesex*.

In the case of the *State, use of Wilcoxon vs. Wooton*, 4 *H. & J.* 21, an action was brought upon an administration bond, which recited that the two obligors first named, were the administrators of *George Wilcoxon*, and conditioned for the faithful administration by them of the personal assets of said *George*. The name of the intestate was not *George*, but *Anthony*; and the only testimony which the plaintiff produced in order to prove the amount of assets in the hands of the administrators, was "the inventory of the goods and chattels of *Anthony Wilcoxon*." Parol testimony was offered to show the name of the intestate, the testimony was rejected by the court below, but upon an appeal the judgment was reversed. The ground of the decision is not stated, but it may be inferred from the argument at the bar, that it was because it appeared from the proof, that the bond was given by the administrators of *Anthony Wilcoxon*, and the variance was a mistake committed in that case, (as in this) by the obligors themselves.

The case in 4 *Wend.* 675, is very much like this case. It was an action of *assumpsit* brought against a sheriff for money collected by him on execution, on which, the declaration stated, was an endorsement directing him to levy \$242 16 and his fees, and which he then and there levied of the goods of the defendant. The plaintiff in order to sustain his action, produced an exemplification of the execution, on which was an endorsement directing a levy of the sum mentioned in the declaration, *with interest since May, 1826*, besides fees: objection was made to the exemplification being offered in evidence, on the ground of the variance in the execution, directing the levy of interest, and such direction not being stated in the declaration, the case

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was taken to the Supreme Court, and in the opinion pronounced by the court, this point was thus disposed of—"as to the bill of exceptions, the variance between the execution produced in evidence, and that stated in the declaration was not material. The endorsement so far as it is set forth is accurate, and the variance is merely in the omission to aver that the sheriff was directed to levy interest as well as the damages and costs. It could raise no doubt as to the identity of the writ."

It is unusual in bonds of this description to set forth the judgment. It is merely said that at such a term, and in such a court, the obligee recovered judgment against the first named obligor, and that the latter is about to appeal therefrom. It was the fault of the obligors themselves that the judgment was not correctly recited in this bond, and they ought not to be benefitted by the error or omission which is attributable to themselves, and to which the plaintiffs had no opportunity of objecting.

If the judgment had been recited in this bond in the usual way, it would not have been identified more satisfactorily than it now is. If in the case last cited, the omission of interest was deemed an immaterial variance, surely the same omission ought not to be a bar to this action.

JUDGMENT REVERSED ON BOTH EXCEPTIONS AND  
PROCEDENDO AWARDED.

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JOHN YOUNG vs. MESHACK FROST, ISAIAH FROST, AND  
OTHERS.—*December, 1847.*

*F., Senior*, devised separate and distinct portions of his land to each of his three sons, *J., M. and F., Junior*; and to his two sons, *J. and M.*, an equal interest in the coal mine and saw mill on the part devised to *F., Junior*, as he took under his father's will. That estate he orally contracted to sell to *N.* In this state of things, *J., M. and N.* agreed with each other, that they and their heirs and assigns should thereafter have and enjoy free and equal intercourse to each

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one undivided third part of all the coal in and on all our land; that is to say, *F.'s, Junior*, part now sold to *N.* *J.* agreed to let *M.* and *N.* have free intercourse to the coal mines on his property left him by his father, and to let *M.* and *N.* have the privileges of coal on his land, building a house at the mouth of the pit for the conveniency of coal diggers. *M.* gave to *J.* and *N.* the same privileges; and *N.* gave to *J.* and *M.* the same privileges, and "to share alike and alike." This agreement, which was under seal, further declared, that *J.* and *M.* doth agree to give to *F., Junior*, and his heirs, the privilege of the interest of their two shares of coal, all that he will haul with his own teams, or his heirs, by digging coals for himself, or themselves, for which the said *F., Junior*, doth agree to keep the banks in complete order, so as not to injure them by digging, to destroy the banks. Shortly after this, *F., Junior*, conveyed his interest by deed to *N.* *Held*,

1. That the clause in the agreement,—“that is to say, *F.'s, Junior*, part now sold to *N.*,” was not an exposition of the whole instrument, and did not restrict and confine the whole contract to the land sold by *F., Junior*, to *N.*, for neither *J.* nor *M.* could confer upon *N.* any benefit in his own land and coal.
2. That clause was intended to show, and shows, out of what land and coal *N.* designed to secure a benefit to *J.* and *M.*, and obliges him to allow them the privileges they claimed under their father's will.
3. The parties had declared that all three and their heirs should have and enjoy free and equal intercourse to each one undivided third part of all the coal in and on all our land, and the subsequent terms, “that is to say, &c.,” qualify those general expressions, and point out what land, as respects *N.'s* obligation, they were intended to include.
4. This agreement so far contains the essentials of a contract, and the intention of the parties is so manifest on its face, that a court of equity may decree its specific execution.

Courts of justice, as far as practicable, will avoid such constructions of agreements, as may render them void; and endeavor to give an operative and binding meaning and intention to the stipulations of the contracting parties.

Upon a contract under seal, containing mutual stipulations, a court does not affect to weigh the actual value, nor insist upon the equivalent in contracts, where each party has equal competency.

Improvvidence or inadequacy of consideration, do not determine a court of equity against decreeing specific performance. When undue advantage is taken, it will not enforce that.

Parol evidence is not admissible to prove the intention of a contract under seal; but it is admissible to prove fraud, or omission by mistake only.

APPEAL from the equity side of *Alleghany* County Court.

The bill in this cause was filed on the 17th February, 1845, by *John Young*, and alleged that on the 22d August, 1843, he purchased of a certain *John Neff*, at and for the consideration of \$7,000, cash payment, all those parts or parcels of the



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real estate of the late *Josiah Frost*, and all other interests in said real estate which were devised by the said deceased to his son, *Josiah Frost, Junior*, and which were conveyed by the said *Frost, Junior*, to the said *John Neff*, by deed bearing date the 1st December, 1828, and duly recorded, excepting that portion thereof which was sold by the said *John Neff* to *J. L. Skinner*, and which is mentioned and described in the deed from the said *John Neff* and others, to *Charles Williams* and *Orlando Harryman* of the city of *New York*, bearing date, &c., and duly recorded; and that your orator also purchased of the said *John Neff* all the interest, rights and privileges which were acquired and secured to the said *John Neff*, under and by virtue of certain articles of agreement, made and entered into between him, the said *J. N.*, and *Isaiah* and *Meshack Frost*, bearing date on the 27th October, 1828.

And your orator further sheweth, that by the last will and testament in which the said *Josiah Frost*, deceased, devised the lands and interests as aforesaid to the said *Josiah Frost, Junior*, he also devised certain lands and interests to his other two sons, namely, the said *Isaiah Frost* and *Meshack Frost*. That the devise to the said *Josiah Frost, Junior*, was all that parcel of land lying and being in said *Alleghany* county, and distinguished as follows, to wit: Beginning at the beginning of lot No. 3639, &c.

Also the whole tract of land called "*This or None*."

That the devise to the said *Isaiah Frost* was of all that parcel of land lying and being in said county, and distinguished as follows, to wit: Beginning at the end of three perches on a line drawn North, sixty-two degrees West from a bounded white oak, standing on the North side of the turnpike road, &c.

That the devise to the said *Meshack Frost* was of the following parcels of land lying and being in said *Alleghany* county, to wit: Beginning for the first parcel at the end of three perches on a line drawn North, sixty-two degrees West from a bounded white oak, standing on the North side of the turnpike road, and running, &c.

And beginning for the second parcel at the same beginning,

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and running North seventy-four degree and a half, East thirty-one perches, to the end of thirty perches on the first line of lot No. 4088, and with it reversed North ten degrees, West ten perches to a stake, &c.

And your orator further sheweth, that in connexion with the devise made as aforesaid to the said *Josiah Frost, Junior*, the testator excepted and reserved for the benefit of his other two sons, *Isaiah Frost* and *Meshack Frost*, in the words following, to wit: "*Nevertheless, the saw mill and coal mine situate and being on this, my son Josiah's part, it is my will and pleasure, and I do hereby ordain that my two sons, to wit, Isaiah and Meshack, shall have shares alike in the said saw mill and coal mine with my said son Josiah, that is to say, each one-third to them and their heirs and assigns forever.*"

And your orator further sheweth, that he also herewith exhibits a true copy of the aforesaid articles of agreement mentioned and referred to in exhibit A., which were made and entered into between the said *John Neff, Isaiah Frost* and *Meshack* on the 27th October, 1828, which said copy is in the handwriting of the late *Benjamin G. Vaughn*, deceased, with whom the original articles were deposited, to be kept by consent of the parties. That by the said articles it is agreed between *Isaiah Frost, Meshack Frost* and *John Neff*, heirs and representatives of *Josiah Frost*, deceased, in the words following, to wit: "that they and their heirs and assigns shall hereafter have and enjoy free and equal intercourse, that is to say, to each one undivided third part of all the coal in and on all of our land, that is to say, *Josiah Frost's* part now sold to *John Neff*, and the said *Isaiah Frost* doth agree to let *John Neff* and *Meshack Frost* have free intercourse to the coal mines on his property left to him by his father; and he further agrees to let *Meshack Frost* and *John Neff* have the privileges of coals on his lands, and the privilege of building a house at the mouth of the pit, such a house as suits themselves for the conveniency of coal diggers; and also the said *Meshack Frost* doth give to *Isaiah Frost* the same privileges as above; and also the said *Neff* doth agree to give unto *Isaiah Frost* and *Meshack Frost*

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the same privilege as above, in coals, building houses and making repairs, and to share alike and alike; and the said *Isaiah* and *Meshack* do agree to give unto *Josiah*,” &c. &c., which said articles of agreement are sealed as well as signed by the said *John Neff*, *Isaiah* and *Meshack*. That it thus appears from the explicit language of the said articles of agreement, that the said *John Neff*, *Meshack* and *Isaiah* mutually covenanted, each with the other, that they should severally have one undivided third part of all the coal “in and on” all the land which had been devised as aforesaid by the last will and testament of *Josiah*, deceased, to his said three sons, *Meshack*, *Isaiah* and *Josiah, Junior*, to which said *Josiah’s, Junior*, part, the said *Neff* had succeeded by purchase as aforesaid. That at the time these articles were entered into, there was opened and in use upon that part of said estate which was devised to the said *Josiah, Junior*, certain coal shafts or pits denominated “coal mine” in said last will and testament. That the testator devised to the said *Meshack* and *Isaiah Frost*, equal shares in this “coal mine” with the said *Josiah Frost*, on whose portion of the devised estate, the shafts or pits opened as aforesaid; and that in order that the said *John Neff*, *Meshack Frost* and *Isaiah Frost*, might be invested with equal shares in all the coal appertaining to the lands respectively devised as aforesaid by the said testator to his three sons, they mutually covenanted for such equal shares by the aforesaid articles of agreement. And your orator further sheweth, that having become entitled by the purchase and deed from *Neff* as aforesaid, to one undivided third part of all said coal, as well as to the sole right and possession of the surface and soil of that part of said estate devised as aforesaid to *Josiah Frost, Junior*, excepting so much thereof as was conveyed as aforesaid to *Williams* and *Harryman*, as well as the coal in such parcel, *he was anxious to have his interest in said coal divided and set apart from the interest of the said Meshack and Isaiah Frost respectively. That such a division as will give to each of the parties his portion and share in screralty, of one undivided third part of said coal is practicable.* That the quantity of coal con-

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tained in said devised land, is easily estimated, and that a division thereof can be made by surface measurement and delineation. And in order to have such a division effected by private arrangement between the parties, your orator has repeatedly solicited the said *Meshack* and *Isaiah* to unite with your orator and either proceed to make a division amongst themselves, or to elect some competent third person or persons skilled in engineering, and having a thorough knowledge of the subject, to make such division. And your orator further sheweth, that he had hoped and believed, that he could have in the meantime effected some satisfactory arrangement with the said *M.* and *I.*, in regard to the working of the "coal mine" already opened and in use as aforesaid upon the *Josiah Frost* part of said devised estate. That for the last several years, or at least for some time past, a certain *George Layman* has been in possession of said coal mine, using and working the same by virtue of some lease or authority given to him by the said *M.* and *I.*, and that no account has been kept or rendered of the quantity of the coal mined and taken away by the said *Layman*, and that no account is now being kept or rendered, and that your orator is entirely without any data whereby such quantity can be ascertained. And your orator has been informed and believes, that the mining operations of the said *George Layman* are carried on without any sort of skill or ability, and that they tend to the ruin and destruction of the mine; that for the sake of securing *present* advantages and facilities in getting out coal, the said *Layman* is removing the pillars which have been heretofore left as the props and supports of said mine. That these pillars are indispensable to the safety and security of the miners. That although a few of them, if left standing, may answer the purpose for a short while—for a year or so whilst the tenant remains—yet that without a goodly number thereof judiciously arranged and distributed through the mine in its various chambers, it becomes dangerous in time to carry on coal excavations in said mine; and that owing to this sense of danger, which spreads itself amongst the miners, the proprietor is unable to employ them, and hence, the mine itself ultimately



becomes useless and valueless; and if the proprietor wishes to make any further use of his coal beds or veins, he is driven to the necessity of making new openings and sinking new shafts. For these and various other reasons, your orator was anxious to effect an amicable arrangement between himself and the said *Frosts*, in regard to the interest which they held in common in said coal; and your orator had well hoped and believed, that he could have effected by private arrangement an amicable division of their interests. But your orator has wholly failed in his just and reasonable expectations heretofore entertained in this behalf. The said *Meshack Frost* and *Isaiah Frost* not only refuse to make an amicable division with your orator or the coal interest held in common by them as aforesaid, but they refuse to make any terms or come to any arrangement whatever with your orator. They deny that your orator is entitled under said articles as the grantee of *Neff*, to an undivided third or any other part whatsoever of the coal “in and on” those parts of the estate of *Josiah Frost*, deceased, which were devised to the said *Meshack* and *Isaiah* as aforesaid. They deny that your orator has any right or authority to call them to an account or settlement for the coal that is being taken and carried away from the aforesaid “coal mine.” And your orator further sheweth, that the said *M.* and *I.* are proceeding in defiance of your orator’s remonstrances, and against the interests and in open violation of the rights of your orator, to dig and open new coal shafts and pits upon said devised lands; that they pretended to have located such new shafts or pits upon those parts of said lands respectively devised to the said *M.* and *I.*; but they are wantonly and notoriously cutting roads leading to and from said new shafts or pits, in, upon and over *Josiah Frost’s, Junior*, part of said devised lands, and especially that portion of such part of which the surface or soil is exclusively owned by your orator, as the grantee of *Neff*. Your orator is persuaded and believes that the said *Meshack* and *Isaiah Frost* have not sufficient business capacity and habits to qualify them to carry on mining operations with any sort of success. And that unless your orator can be left

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to his own separate management in regard to his share of said coal interests, he had better relinquish his rights altogether. That a gratuitous surrender of them would be preferable in his opinion, to a participation with the said *Meshack Frost* and *Isaiah Frost*, in any of their schemes or plans for the mining of coal. That judging of these men as they are, and also judging of them by their past operations, there would be every reason to fear that instead of making profits by the business, they will only add to their debts thereby, &c. And that it will be destructive and ruinous to the interests of your orator, if the said *Meshack* and *Isaiah* are suffered and permitted to go on, opening, as they are now doing at their discretion, new shafts and pits upon said devised lands, at such points as they may think fit to designate, and to cut and make roads to such shafts and pits, over the land of your orator, just as they may choose, not only without the consent of your orator, but without consultation with him, and against his express wishes and remonstrances. *Prayer* for a discovery—account of coals mined and sold—profits and emoluments—specific execution of the articles of agreement of 27th October, 1828—mutual execution of deeds—division and separation of all the coal owned in common—each to be allotted his part in severalty, and this either by surface measurement or by separate alternate enjoyments of the whole for certain limited periods—for an intermediate injunction—subpcena, and general relief.

With their bill the complainants exhibited,

1. A deed from *John Neff* to *John Young*, of the 22d August, 1843, all the estate devised by *J. F., Sr.*, to *J. F., Jr.* and conveyed by the latter to *John Neff*, on the 1st December, 1828, and all the estate and interest granted to *J. N.* under the articles of agreement of the 27th October, 1828.

2. The last will of *Josiah Frost, Senior*, of 30th March, 1813.

3. Extract of deed from *Josiah Frost* to *John Neff*.

4. Deed 30th September, 1835, *John Neff, Isaiah* and *M. Frost*, to *Charles Williams* and *Orlando Harryman*.

5. Exhibit E. The agreement of 27th October, 1828, be-

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tween *Isaiah* and *Meshack Frost* and *John Neff*, attested by *B. G. Vaughn*, a copy of which will be found in the opinion of this court.

The answer of *Meshack* and *Isaiah Frost*, admitted that *Josiah Frost, Senior*, did by his last will and testament devise to his three sons, namely, these defendants, and *Josiah Frost, Junior*, the several portions of his real estate, which are particularly described in the said bill of complaint. And these defendants further admit, that the said *J. F., Jr.*, did sell and convey to the said *John Neff*, the real estate so devised to him by the will of his said father, as appears, &c. And they also admit that certain articles of agreement were executed between *Isaiah Frost, Meshack Frost* and *John Neff*, in and about the month of October, in the year 1828, but these defendants deny that the paper exhibited by the complainant, marked "E," is an exact copy of the said agreement, and they therefore call upon the complainant to produce the original agreement. They, however, totally and positively deny that the said agreement had reference to all the lands which had been so devised by the said *J. F.*, deceased, to his three sons *I., M.* and *J.* On the contrary thereof, these defendants aver, that said articles of agreement referred exclusively and alone to the land so devised to the said *Josiah Frost, Junior*, in the coal, upon which part the said brothers had, by the will of their said father, a joint interest, whilst neither the said *J. F., Jr.*, nor the said *J. N.*, his grantee, had any interest under said will, in either the coal or the lands of either of the said *Meshack* or *Isaiah*.

These defendants further answering say, that at the time of the execution of the will of the said *J. F., Senior*, neither the extent nor the value of the coal deposits of *Alleghany* county were known or appreciated. There was but one mine opened or used on the estate of the said testator, and that was the portion of his estate which he devised to his son *Josiah*. In this coal mine, there being no other at the time opened or in use upon his estate, the testator gave to his three sons shares alike, that is to say, each one-third to them and their heirs and

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assigns forever. And these defendants are advised and so insist, that by the terms of the said devise they are vested with an estate of inheritance in all the coal in and upon the portion of his estate so given by the testator to his son *Josiah*. That up to, and for a considerable period after the execution of the agreement of October, 1828, that is to say, up to the year 1844, the said coal mine remained the only coal mine on the whole estate so devised by the said testator, except part of an opening made by *George Waddle* some time about the year 1833 or 1834, and which was supposed by him to be made upon his own land, but was afterwards ascertained to be in part upon the said *W.*'s land, and in part upon the said land so devised to the said *J. F., Jr.* That the said agreement had respect only to the coal mine, so as aforesaid open in the year 1828, at the time the said articles of agreement were executed, belonging equally to the parties, and the same was intended to settle and adjust among themselves, in a manner most convenient to the parties, rights which they already possessed, and not to create any new rights not existing in the said *John Neff* prior to the said agreement. That no consideration passed from the said *John Neff* to these defendants, or either of them, nor did any other reason or inducement exist why they should grant to said *Neff* a right to enter upon their soil and dig for coal, without restriction as to time, place or quantity. These defendants further state, that in or about the last of October, 1828, the said *J. F., Jr.* and *J. N.* were in treaty for the lands of the said *Josiah*, when these defendants understanding that the said *J. F., Jr.* and *J. N.* had gone up to *Benjamin C. Vaughn's*, the defendants followed them up to the said *Vaughn's*, and there informed the said *J. N.* that these defendants owned each one-third of the coal in the lands which the said *J. F.* was about to sell to him, and that the said *J. F.* had promised to let these defendants have three acres of land at the mouth of the coal pit, or at the mouth of any other opening which these defendants might choose to make, and that the said *J. F., Jr.* had promised to allow these defendants to make other and different openings from the opening then on the land, and which was



the only coal opening or coal pit on the said lands devised by the said *J. F.*, *Senior*, by the will aforesaid. The said *J. N.* replied that these defendants had come up for the purpose of interfering or undermining him, the said *J. N.*, in his contract with the said *J. F.* These defendants replied that the said *N.*, after he purchased, might sell to some one who would give these defendants trouble in working their coal, and that the land was as much the land of these defendants, as it was the land of the said *J. F.*, *Jr.*, but that if *Mr. Neff* did not choose to carry out the undertaking which these defendants had with the said *Josiah Frost*, that these defendants could and would purchase the interest of the said *J. F.*, *Jr.* Whereupon, the said *J. N.* agreed, *that if he purchased* from the said *Josiah*, who was present at the whole of this interview, he would give these defendants the privilege of building at the mouth of the coal mine, for miners or coal diggers, and the privilege of taking out coal at any other opening which they might choose to make. These defendants insisted on the agreement being put in writing, when *Benjamin G. Vaughn* was requested to draw the writings, and to carry out this understanding was the only object of the said agreement drawn by *Vaughn*. It was so done, and a few days thereafter the said *J. F.*, *Jr.* sold and conveyed his interest in the land to the said *John Neff*.

And these defendants insist, that even by the copy of the articles of agreement filed by the complainant, it is expressly confined to *J. F.*'s *Jr.* part of the land devised to him by his father, or "*Josiah Frost's* part now sold to *John Neff*." And these defendants aver, that if they had understood the agreement as extending to the lands which these defendants held under the will of their father, they never would have signed or executed it. That there was no consideration passed between the parties for any such a contract. And these defendants aver that *John Neff* never pretended that the said agreement gave him any such rights or privileges, or any interest whatsoever in the lands which were devised to these defendants by their father, until about seven years after said agreement had been entered into. Nor do these defendants believe that the

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said *John Neff* would even then have set up any such an unfounded claim, if it had not been that he had sold a large portion of these lands so purchased from *Josiah Frost, Junior*, to *Charles Williams* and *Orlando Harryman*, and promised to make them a title in fee for the same, which he was unable to do, because these defendants held each one-third of the coal in said land by the will of their father. And these defendants refused to sell said interest, or join the said *John Neff* in said conveyance, unless these defendants received a certain portion of the purchase money. Then for the first time, these defendants heard of the claim of the said *John Neff*, as now set up in the complainant's said bill of complaint. These defendants then, as now, positively denied the right of the said *John Neff* to any interest in the coal in the lands of these defendants, as devised to them by the will of their father, and they now charge that the complainant knew at the time he purchased, that these defendants denied any such right in the said *Neff*, and that the complainant was purchasing a law suit. These defendants admit that the complainant and these defendants are tenants in common in the coal in that part of the land which the complainant purchased of the said *John Neff*, as part of the land conveyed to him by the said *Josiah Frost, Junior*, and which these defendants believe amounts to about fourteen or eighteen acres. To a division of the coal in this piece of land by surface measurement, as said complainant proposes, these defendants have not only no objection, but are anxious for said division, because these defendants have about the same opinion of the complainant's sense, that the complainant charges in his bill, he has of the skill of these defendants to manage their own business. These defendants aver, that previous to the sale by the said *John Neff* of his interest in and to the land sold to the said complainant, the said *John Neff* had taken a large quantity of coal out of said coal mine, to wit, from four to six hundred thousand bushels, with the understanding and agreement, that these defendants should take an equal quantity each, whenever they desired to do so, and these defendants aver that neither of them have yet taken out any thing like the

amount which the said *Neff* took out previous to his sale to the complainant. And these defendants claim to take out as much coal as will make them equal with the said *John Neff* in that respect. These defendants admit that they placed the said *George Layman* in said coal mine, and authorized him to take coal therefrom, as they had a right to do under their agreement with the said *J. N.* These defendants also admit, that the said *Layman* has not kept an exact account of the number of bushels taken out by him, because the said *John Neff* kept no accurate account whilst he was taking out coal, and the said *Layman* has not taken out one-third of the coal which said *Neff* took out under the agreement before he sold to the complainant. But these defendants deny that the said *Layman* has been carrying on the mining of coal in said mine without skill, or that he is working the mine in such a way as to destroy the mine, as alleged in said complainant's bill. These defendants also deny that it is true, "that for the sake of securing present advantages and facilities in getting out coal, the said *Layman* is removing the pillars which have been heretofore left as the props and supports of said mine," as is alleged in said bill. On the contrary, these defendants aver, that neither the said *George Layman*, nor any other person in the employ of these defendants, or either of them, ever did remove any of the said pillars, or do any other injury to the said coal mine as alleged in said bill, but these defendants charge that the said *J. N.* and persons under his employ, did remove several of the said pillars in the said mine, before complainant purchased, against which these respondents remonstrated with the said *J. N.* at the time, and actually threatened to file a bill of injunction against said *Neff*, to prevent him from thus removing the said pillars, when, after consulting a lawyer on the subject, he, the said *John Neff*, promised to cease removing any more of the said pillars.

A commission was issued to take proof, and it appeared that the agreement of October, 1828, had been drawn by *B. G. Vaughn*, and left with him by the parties; that he had said he had sent it to *Wright* by request of *Mr. Frost*. *Wright* proved

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that he had never received it. Notice was given to the defendants to produce it, and it was admitted that diligent search had been made for the agreement among *Vaughn's* papers, who was dead, and that the original could not be found. The copy was proved by *Josiah Frost*, present at its execution, and by *George McCulloch*, who had seen the original in the hands of *Vaughn*, and knew the signatures of the parties.

After many exceptions to the proof as taken, the cause was submitted to *Alleghany* county court, (*MARTIN J.*) who, on the 9th October, 1846, pronounced the following opinion and decree:

In the examination of this case, several questions of interest were raised by the counsel and discussed with ability; but the construction which I have placed on the agreement of the 27th October, 1828, renders it unnecessary to express an opinion of those points.

I am satisfied from an examination of the evidence, that the paper referred to in the testimony of *George McCulloch*, and designated as number 4, is the true copy of the original agreement mentioned in the proceedings. And as it corresponds with the agreement described in the bill, I can perceive no reason for any just exception to the pleadings; either on the ground of variance between the contract charged, and that which was proved, or because the contract is not set out with sufficient distinctness and precision.

It is certainly an undoubted proposition, that the contract charged in the bill must accord with that which is verified by the evidence, but when that is accomplished, I am aware of no principle of law which could deprive a complainant of the specific execution of a contract, unexceptionable in other respects, because he was mistaken in the accuracy of a paper referred to, as a supposed copy of a lost agreement. If there had been created any real doubt as to whether the paper referred to as exhibit E., or the paper numbered 4, was the representative of the original agreement, the case would have presented a different aspect, as there is a marked discrepancy between them, and the court could not have pronounced



which was to be enforced. But this difficulty is removed by the evidence, and the objection is indeed at once silenced by the answer of the defendants, in which they admit that the paper E. is not an exact copy of the agreement.

The agreement is in these words:

“Articles of agreement made and agreed on this 27th day of October, 1828, between *Isaiah Frost*, *Meshack Frost* and *John Neff*, heirs and representatives of *Josiah Frost*, deceased, have and do hereby fairly agree to and with each other, that they and their heirs and assigns shall hereafter have and enjoy free and equal intercourse: that is to say, to each one undivided third part of all the coal in and on all our lands, that is to say, *Josiah Frost’s* part now sold to *John Neff*. And the said *Isaiah Frost* doth agree to let *John Neff* and *Meshack Frost* have free intercourse to the coal mines on his property left him by his father, and he further agrees to let *Meshack Frost* and *John Neff* have the privileges of coals on his land, and the privileges of building a house at the mouth of the pit, such a house as suits themselves for the conveniency of coal diggers; and also, the said *Meshack Frost* doth agree to give to *Isaiah Frost* and *John Neff* the same privilege as above; and also, the said *John Neff* doth agree to give unto *Isaiah Frost* and *Meshack Frost* the same privileges as above in coals, building houses, and making repairs, and to share alike and alike. And the said *Isaiah Frost* and *Meshack Frost* doth agree to give unto *Josiah Frost* and his heirs, the privilege of the interest of their two shares of coal, all that he will haul with his own teams or his heirs, by digging the coals for himself or themselves, for which the said *Josiah Frost* doth agree to keep the banks in complete order, so as not to injure them by digging to destroy the banks,” &c.

It appears that *Josiah Frost, Senior*, by his will dated the 30th March, 1813, after having given proportions of his estate to his three sons, made the following devise to *Josiah Frost*.

“Also, the whole of a tract of land called “*This or None*,” nevertheless, the saw mill and the coal mine situate and being on this, my son *Josiah’s* part, it is my will and pleasure, and I

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do hereby ordain, that my two sons, to wit, *Isaiah* and *Mes-hack*, shall have shares alike to the said saw mill and coal mine, with my said son *Josiah*, that is to say, one-third to them and their heirs and assigns forever."

With these papers before me, and the conceded fact that at the date of the will of *Josiah Frost*, there was open upon his lands, but one coal mine, I proceed to the examination of this obscure agreement.

In the construction of an agreement of this kind, it is important to ascertain with as much certainty as possible, what was the subject matter in the contemplation of the parties, and the thing or object about which they were stipulating.

From the introductory clause of this instrument, it would seem that the object in the view of the parties was the coal mine, or that part of the estate which was devised to *Josiah Frost*. The first words are "all our lands." This expression is limited by the words—"that is to say, *Josiah Frost's* part now sold to *John Neff*." If the parties had intended to embrace by this contract the lands devised to them by *Josiah Frost*, then when they came to limit the broad and general words, "all our lands," they would have said, meaning the lands covered by the will. But the limitation is confined to the part of *Josiah Frost*, and which he had sold to *John Neff*.

It will be seen that the subject about which these parties manifested great anxiety, was the privilege of erecting such houses as would facilitate their mining operations, and yet, what is the privilege which this contract professes to secure? The right of building a house at the mouth of the "pit,"—what pit? They could mean no other than the mine which was open upon that part of the estate devised to *Josiah Frost*. Considering these two clauses of the instrument, it is evident that the subject matter about which the parties intended to stipulate, was the open coal mine on the land devised by the will of *Josiah Frost* to *Josiah Frost, Junior*.

It is to be remarked, that there are to be found in this agreement no words of grant or alienation; but the words constantly used are "*free intercourse*," importing a purpose rather

to secure uninterrupted access to a thing already possessed, than the intention to grant or confer new rights.

Assuming this to be the true construction of the contract, the difficulty arises with respect to the clause which gives to *John Neff* "free intercourse" to the coal mines on the property left to *Isaiah Frost* by his father. And it was asked, what meaning is to be attached to the words "left to him by his father," and what object had *John Neff* in assenting to an agreement, which only gave him the privilege of using his own mine, and building upon his own land. This throws obscurity on the whole paper. The parts and clauses of the instrument are irreconcilable. The language referred to certainly carries the meaning ascribed to it by the counsel for the complainant, but I cannot permit it to overcome the intention of the parties, as manifested by the whole contract.

In the construction of all instruments, it is the duty of the court not to confine itself to the force of any particular expression, but to collect the intention from the instrument taken together; yet the judges are not authorised to deviate from the force of a particular expression, unless they find in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression may impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every court is bound by it, unless it be plainly controlled. *Chit. on Cont.* 73. I think there are to be found in this agreement, expressions which manifest that the authors of the instrument could not have the intention which the literal force of the expression referred to, imputes to them.

The preparation of this paper was committed to the hands of an unskilful draftsman, and I may say with the Vice-Chancellor in the case of *Clowes* against *Higginson*, 1 Ves. and Bea. 531, that it is extremely difficult to put any construction upon an instrument so loosely and imperfectly expressed. But this ambiguity would present an insuperable objection to the specific execution of the contract, as prayed for by the complainant.

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In the case of *Colson* against *Thompson*, 2 *Wh.* 336, the Supreme Court say:—

“The contract which is sought to be specifically executed, ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, a court of equity will not exercise its extraordinary jurisdiction to enforce it.”

The same doctrine is announced in the case of *Clowes* against *Higginson*, 1 *Ves. and Bea.* 524; and is founded in the obvious reason, that a court of equity should never act upon conjecture.

The application, therefore, for specific performance of this agreement, as asked for by the complainant, is denied.

It is proper to state, that I consider the rights of *Isaiah Frost* and *Meshack Frost*, under the devise of *Josiah Frost, Senior*, as confined to the coal mine open and in use at the date of his will, and that their rights in this respect are not enlarged by the agreement of the 27th October, 1828. That under that contract, they have no right to any coal upon or under the land devised to *Josiah Frost*, and sold by him to *John Neff*, except what is to be found in the coal mine, which had been opened at the date of the will of *Josiah Frost, Senior*.

It has been seen, that by the will of *Josiah Frost, Senior*, there was devised to *Isaiah Frost* and *Meshack Frost*, and their heirs and assigns, one-third each in the coal mine then open upon the land devised to *Josiah Frost, Junior*. *Josiah Frost* subsequently sold his estate to *John Neff*, and the complainant has acquired the interest of *John Neff*. The bill states, that the shares of the parties entitled to this mine are capable of separation and division by surface measurement, and prays for a partition of their respective parts. The defendants in their answer admit that a division may be accomplished by surface measurement, and consent to a partition. I shall therefore order a commission to issue to four competent persons to make, if practicable, a partition of this coal mine, and to report to the court accordingly. I shall also order the papers to be referred to the auditor, that he may ascertain from the evidence in the cause, and such other proof as may be



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produced before him, on the usual notice being given to the parties, the quantity of coal and its value, which has been taken from this mine by the parties in this cause, and by *John Neff*, under whom the complainant claims.

I shall, however, direct the injunction which has been granted in this case to be dissolved. The bill charged that the mining operations were carried on by the defendants without skill or ability, and that they tend to the ruin and destruction of the mine. This certainly presented a proper case for the application of the writ of injunction. It is now settled, that a court of equity will interfere when the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. 2 *Sto. Eq.* 260. *Livingston* against *Livingston*, 6 *J. C. R.* 497. *United States* against *Gear*, 3 *How.* 121. But all the facts charged in this bill as the foundation of an injunction, have been denied by the answer, and these responsive averments of the answer stand uncontradicted, and not disproved. To stay the mining operations of these parties during the period which must elapse before the final adjustment of the cause, might inflict serious injury upon all of them, and is not demanded by the circumstances of the case.

It is thereupon this eighth day of October, 1846, adjudged, ordered and decreed by *Alleghany* county court, sitting as a court of equity, that a commission issue to *Elisha Coombs*, *William Ridgely*, *Ichabod L. Skinner* and *Thomas C. Atkinson*, authorising them, or any three of them, to enter upon, survey, lay off, and divide the coal mine on the land devised by *Josiah Frost, Senior*, to *Josiah Frost, Junior*, by his will dated the 30th March, 1813, which was open at the date of the said will, into three equal parts, whereof one part shall be allotted to *John Young*, the complainant, one part to *Isaiah Frost*, and one part to *Meshack Frost*, the defendants, if the commissioners shall be of opinion that the same is practicable. And if they shall be of opinion that the said coal mine cannot be divided without injury to the same, and disadvantage to the parties, they shall express their reasons for such opinion. And the

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said commissioners shall make a return of the proceedings as soon as may be, subject to the further order of this court. And to said commission shall be annexed the usual oath of office.

And it is further decreed that this cause be referred to the auditor, that he may take an account of the coal taken out of the said mine, and the value thereof, by the parties in this cause, complainant and defendants, and by *John Neff*, under whom the complainant claims, from the pleadings and proofs in the cause, and such other proofs as the parties may produce before him, on giving the usual notice. And it is further decreed, that the injunction heretofore granted in this cause, be and the same is hereby dissolved.

From this decree the complainant appealed.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By WM. SCHLEY and McMAHON for the appellant, who insisted:

1st. That the agreement of 27th October, 1828, is capable of being construed; and that its true construction is, that it applies to all the land devised by the testator, *Josiah Frost, Senior*, to his three sons, *Meshack Frost*, *Isaiah Frost*, and *Josiah Frost, Junior*.

2nd. That said agreement was made upon a good and sufficient consideration.

3rd. That upon the whole case, as it appeared upon the pleadings and the proof, an injunction ought to have been awarded, until the accounts were taken and partition made.

By PRICE and T. J. McKAIG for the appellees.

The case is this: *Josiah Frost, Senior*, by his will, dated 30th March, 1813, devised to his three sons, *Meshack*, *Isaiah* and *Josiah*, contiguous portions of his real estate, described by metes and bounds.

He gave to *Isaiah*, the use of a spring, called *Stophel's*

spring, on *Meshack's* part. Also to *Meshack*, the use of a spring on *Isaiah's* part; and to the devise to *Josiah*, is annexed the following proviso, viz :

“Nevertheless, the saw mill and the coal mine situate and being on this, my son *Josiah's* part, it is my will and pleasure, and I hereby ordain, that my two sons, to wit, *Isaiah* and *Meshack*, shall have shares alike in the said saw mill and coal mine, with my said son *Josiah*; that is to say, each one-third, to them, their heirs and assigns forever.”

*Josiah Frost*, the devisee, conveyed his part of the estate to *John Neff*, by deed, dated 1st December, 1828.

*Neff* conveyed a part of the land so purchased from *Josiah Frost*, to *Charles Williams* and *Orlando Harryman*, by deed, dated 30th September, 1835, and the residue to *John Young*, by deed, dated 22d August, 1843.

A short time prior to the conveyance from *Josiah Frost* to *John Neff*, a paper was executed between *Isaiah Frost*, *Meshack Frost* and *John Neff*; it purports to be an agreement between those parties, dated 27th October, 1828. This agreement is the foundation of the whole proceeding, the bill being for a specific execution of it, by *John Young* against *Isaiah* and *Meshack Frost*.

The original of this agreement has been lost, and two copies are to be found in the record.

The court will examine this paper in the record. The question arising on this agreement, and which forms a main branch of the controversy between the parties is, whether this agreement had reference to all the coal, in all the lands devised by the testator to his three sons, *Isaiah*, *Meshack* and *Josiah*, as the complainant contends it has, or to the coal in *Josiah's* part alone, as the defendants insist.

The complainant relies upon the language of the agreement, to shew that it was intended to cover all the lands of the three brothers, and to give to *Neff* the one-third in all their coal, in consideration of one-third in the coal in his land, which he gave by the agreement to them. The defendants rely upon the language of the agreement, and the situation of the parties,

and of their lands, together with the circumstances of the case, to shew that the agreement concerned the coal in *Josiah Frost's* part.

The facts and circumstances relied upon by the defendants to sustain their case, are :

The will of the father, an extract from which is already given, by which an equal third part is given to *Meshack* and *Isaiah*, in the coal mine on *Josiah's* part. And it is insisted, that the agreement was intended to secure and protect the interest, their access to the coal mine, with the privileges necessary to get out the coal. In support of this view, they shew, that at the date of the will, there was but one coal mine opened upon the whole estate of the testator, and that was situated on the part devised to *Josiah Frost*. This is proved by *Wm. McNair*, *David Waddle*, and also by *Geo. McCulloch*. That the testator did not in fact know that there was any coal on his estate, to which access could be had, but through the old mine on *Josiah's* part.

Again, the defendants shew the circumstances under which the agreement of October, 1828, was made, at whose instance, and with what view, which are proved by *Josiah Frost*.

The will was made in 1813; and in 1828 *Josiah* was in treaty with *John Neff*, for the sale to him of his land. They had gone to *Vaughn's* to have the papers drawn. While there, *Isaiah Frost* hearing of what was going on, came to *Vaughn's* also, and said that the will of his father, although it gave him and his brother *Meshack*, the right to one-third of the coal mine, yet did not give them the necessary privileges for depositing their dirt, and getting the coal out. He said they ought to have a few acres at the mouth of the mine, for the purpose of building houses for miners. He said that these privileges must be secured to them by *Neff*, if he purchased, or he and *Meshack* would buy from *Josiah* themselves. *Neff*, after a good deal of objection and complaint about the interference of *Isaiah Frost*, at length agreed to secure them these rights, and it was for that purpose the paper was drawn by *Mr. Vaughn*.



Again, it is proved by the defendants, that at the date of this agreement, in 1828, there was but one coal opening in the whole of the lands of the *Frosts*, and that was this one on *Josiah's* part, sold to *Neff*.

It appears, therefore, that the will was made in 1813; that the three sons used the one mine, on *Josiah's* part in common, under the will, until October, 1828, when the agreement was made, which is the foundation of this proceeding. That at the date of this agreement, no opening was made on the whole estate devised, but the one mine on *Josiah's* part; that the agreement had reference to that mine, and to the right given by the will to *Isaiah* and *Meshack* in that mine. That from the date of that agreement, matters stood on that footing until the 22d August, 1843, when *Neff* conveyed to *John Young*, who on the 17th February, 1845, filed his bill in *Alleghany* county court, as a court of equity, claiming a right to one-third of all the coal in all the lands devised by *Josiah Frost, Senior*, to his three sons, and praying a specific execution of that agreement, as thus understood.

The complainant, to rebut these facts and circumstances as proved by the defendants, examined *John Neff* to prove what his understanding of the agreement was, and *John Neff* proves, that he supposed, under the agreement, he was to have the same right to coal, in the lands of *Meshack* and *Isaiah*, that they had in his. He says, however, that the object of the agreement was to give them the privilege of opening mines on the land he was about to buy from *Josiah Frost*, which the will did not give them. But he says, distinctly, that no consideration passed for the interest he claimed in the coal of *Isaiah* and *Meshack*.

The plaintiff proved also by *J. S. Skinner*, that at the time of the purchase of *Williams* and *Harryman* in 1835, from *Neff*, *Meshack* and *Isaiah Frost* called on him, the agent who made the purchase, to insist that *Neff* had no right to sell the coal which he had purchased from *Josiah Frost* and give a warranty. After a good deal of conversation upon the subject, they agreed to join *Neff* in the deed. He proves also, that

they said at the time, that *Neff* was entitled under the agreement to one-third of the coal on each of their lands, at least this is what he understood from all their explanations of the will of their father, and the agreement of October, 1828. He proved, by *George McCulloch*, that he was one of the arbitrators to whom *Neff* and the two *Frosts* referred the question of the amount of the purchase money from *Williams* and *Harryman*, to which they, the *Frosts*, were entitled, and that the arbitrators gave *Isaiah* and *Meshack* \$1500 each.

There was a survey made for the trial of the case below, and a good deal of testimony taken about position of lands, lines and divisions, but no use was made in the argument of these facts, and it is not supposed they can be deemed pertinent here.

The appellees will contend :

1st. That the agreement, supposing the copies to be true, has reference merely to *Josiah Frost's* part of the estate, and the coal mine existing thereon, and not to the whole estate, including the parts of *Isaiah* and *Meshack*.

2d. That the copies introduced by appellant are not true copies of the original agreement.

3d. That if the original agreement were produced, and the application of it to the whole property were clear, still the case is not a proper one for a specific performance.

SPENCE, J., delivered the opinion of this court.

One of the prayers of the complainant's bill is, that the court will decree the specific execution of an agreement charged in the bill to have been made on the 27th day of October, 1828, between *Isaiah Frost*, *Meshack Frost*, and *John Neff*.

This prayer the court below rejected, and refused to decree the specific execution of the agreement of the 27th of October, 1828, of which agreement, exhibit E. is charged in the bill to be a copy.

Our inquiry then in this case is, whether this agreement is such, as a court of equity will decree, shall be specifically executed?

We think the evidence proves conclusively, first, that there was an agreement made and concluded between the parties on the 27th day of October, 1828; secondly, that diligent inquiry and search has been made for the original agreement, and that according to the principles of law, and rules of evidence governing such cases, a copy was admissible; thirdly, that the paper No. 4 is proved satisfactorily to be a copy of the original agreement of the 27th October, 1828.

Let us now inquire whether the paper No. 4 contains so far, the essentials of a contract or agreement, and the intention of the parties is so manifest on the face of the instrument, as to enable a court of equity to carry out specifically by decree the stipulations of the parties, without invading any of the rules of law which govern courts of equity in the exercise (as it is denominated in the books) of its extraordinary jurisdiction.

The copy of the agreement proved is in these words:

“Articles of agreement made and agreed on this 27th day of October, 1828, between *Isaiah Frost*, *Meshack Frost*, and *John Neff*, heirs and representatives of *Josiah Frost*, deceased, have and do hereby fairly agree, to and with each other, that they and their heirs and assigns shall hereafter have and enjoy free and equal intercourse; that is to say, to each one undivided third part of all the coal, in and on all our lands; that is to say, *Josiah Frost's* part now sold to *John Neff*.

“And the said *Isaiah Frost* doth agree to let *John Neff* and *Meshack Frost* have free intercourse to the coal mines on his property left him by his father: and he further agrees to let *Meshack Frost* and *John Neff* have the privileges of coals on his land, and the privileges of building a house at the mouth of the pit—such a house as suits themselves for the conveniency of coal diggers.

“And also, the said *Meshack Frost* doth agree to give to *Isaiah Frost* and *John Neff*, the same privileges as above.

“And also, the said *John Neff* doth agree to give unto *Isaiah Frost* and *Meshack Frost* the same privileges as above, in coals, building houses, and making repairs, and to share alike and alike.

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“And the said *Isaiah Frost* and *Meshack Frost* doth agree to give unto *Josiah Frost* and his heirs, the privilege of the interest of their two shares of coal, all that he will haul with his own teams, or his heirs, by digging the coals for himself or themselves, for which the said *Josiah Frost* doth agree to keep the banks in complete order, so as not to injure them by digging to destroy the banks.”

This instrument is concluded in the usual form, signed and sealed by *Isaiah Frost*, *Meshack Frost* and *John Neff*, and attested by *Ben. G. Vaughn*.

It should be borne in mind in construing this instrument, that *Josiah Frost*, Sen'r, devised by his will separate and distinct portions of his land to each of his three sons; and to his two sons, *Meshack* and *Isaiah*, an equal interest in the coal mine and saw mill, which were on the part devised to *Josiah*, as he, *Josiah* himself, took under the will of the testator, and that *Josiah* had contracted orally to sell to *John Neff*, all of the land which was devised to him by his father.

It was insisted in the argument on the part of the appellee, that the first article or stipulation in this agreement served as an exposition of the whole instrument, and by force and operation of the words “that is to say, *Josiah Frost's* part now sold to *John Neff*,” restricted and confined the whole contract to the land sold by *Josiah Frost* to *John Neff*. Let us test the correctness of this construction by applying it to the agreement on the part of *Isaiah Frost*, and it will read thus: “and the said *Isaiah Frost* doth agree to let *John Neff* and *Meshack Frost* have free intercourse to the coal mines on his property left him by his father, (that is to say, *Josiah Frost's* part now sold to *John Neff*;) and he further agrees to let *Meshack Frost* and *John Neff* have privileges of coal on his land, (that is to say, *Josiah Frost's* part now sold to *John Neff*;) and the privilege of building a house at the mouth of the pit—such a house as suits themselves for the convenience of the coal diggers.” The agreement on the part of *Meshack Frost* and *John Neff* are the “same as above.”

This construction of this agreement renders it inoperative



and unmeaning. If the stipulations in the agreement are to be confined to "*Josiah Frost's* part now sold to *John Neff*," what benefit or privilege can *Meshack Frost* and *Isaiah Frost* give or confer upon *John Neff* in his own land and coal?

It is well settled that courts of law will not put such a construction upon instruments of this kind as renders them null and void, if they can without violating any rule of law so construe them, as to give to the contracting parties a meaning and intention operative and binding in law.

The only words or expression in this agreement which can possibly cause any doubt as to the intention of the parties, are the words, "that is to say, *Josiah Frost's* part now sold to *John Neff*." The agreement commences thus: "Articles of agreement made and agreed on this 27th day of October, 1828, between *Isaiah Frost*, *Meshack Frost* and *John Neff*, heirs and representatives of *Josiah Frost*, deceased;" and as the intention of the parties was, that they and their heirs and assigns were thereafter to have and enjoy free and equal intercourse, "that is to say, to each one undivided third part of all the coal in and on all our land," it was necessary to shew what land, so far as *John Neff's* obligation related, was intended by the words "all our land," for *John Neff* was neither the heir nor representative of *Josiah Frost*, deceased, and therefore the expression "all our land," would have included all the lands which *John Neff* owned, and the expression "that is to say, *Josiah Frost's* part now sold to *John Neff*," explains what land was intended on *John Neff's* part in the expression "all our land."

Much reliance in the argument was placed on the want of consideration, or the inadequacy of consideration in this agreement. A court of equity does not affect to weigh the actual value, nor to insist upon the equivalent in contracts, where each party has equal competency. When undue advantage is taken, it will not enforce that. Improvidence or inadequacy do not determine a court of equity against decreeing specific performance. *Sullivan vs. Jacob*, 12 *Cond. Eng. Cas. in Chancery*, 235.

We forbear to make any comments in reference to the argument upon the effect of the parol evidence in this case, for the

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reason that it would be admissible to prove fraud, or omission by mistake only; and not the intention of the contracting parties.

We do not consider the complainant in this case obnoxious to the charge or consequences of champerty, either upon principle or authority.

The decree is reversed with costs to the appellant, and the case remanded for further proceedings.

DECREE REVERSED AND CAUSE REMANDED.

The decree of this court adjudged that the agreement of the 27th October, 1828, which is alleged and set forth in the appellant's bill of complaint is satisfactorily established by the evidence in the cause, and that paper marked No. 4 of said evidence and referred to in the testimony of the witness, *George McCulloch*, is by the testimony of said witness proved and established as a copy of said agreement; and also, that the said complainant, *John Young*, as the assignee of *John Neff*, one of the parties to the said agreement, is entitled in equity to demand and have a specific execution of the said agreement, as against the other parties to the same, the said defendants, *Meshack* and *Isaiah Frost*; and also, that the said agreement is not by the words "that is to say, *Josiah Frost's* part now sold to *John Neff*," limited and restricted in its operation to *Josiah Frost's* part of his father's estate, devised to him by his said father, but that said agreement according to its true construction, as to all the rights, interests, and privileges thereby and therein respectively granted to each other by the parties to the said agreement, does extend to and embrace all the lands which were respectively devised to the said *Meshack Frost*, *Isaiah Frost* and *Josiah Frost*, by their said deceased father, *Josiah Frost*.

It is therefore by this court, and the authority thereof, further adjudged, that this cause be, and the same is hereby remanded to the said *Alleghany* county court as a court of equity, in order that the said complainant may by the decree of said court have partition of his rights and interests under said

agreement, as prayed for by his bill, in conformity to the principles of this decree, and that such further proceedings may be had in the cause as are required by the principles of this decree, and the rules of equity.

**HENRY FUNK vs. SUSANNAH HUGHES.—December, 1847.**

In an action of trespass upon the case, brought by a reversioner against a trespasser, the defendant obtained a warrant of resurvey to locate the acts of trespass. At the trial the surveyor testified that certain *stars*, on the plats, were placed there by him as the surveyor, to show the stumps of the trees cut by the defendant, as admitted by the defendant to the said surveyor about two years before the survey. He also proved that he was not instructed by the plaintiff to locate any particular trees or stumps, but was merely directed in general terms to locate the trespass; that there was no witness on the survey sworn as to any trespass, or that pointed out the places where the trees were cut. The surveyor did not point out the places of trespass to the defendant on the ground; nor inform him that he intended to place on the plats those particular points as designating the trespass; and also testified that he placed them there to enable him to show with certainty the places where the trees had been cut down, should he be sworn on the trial. The explanations did not mention that the plaintiff complained of trespasses at such stars. *Held*, that the surveyor was not competent to prove the stars, as the places, where the trespass complained of had been admitted to him by the defendant.

Under issue joined in an action of trespass upon the plea of not guilty, the plaintiff may recover damages for any trespass by the defendant of the nature described in the declaration, and committed any where within the lines of the tract of land mentioned in it.

But where plats are deemed requisite, it is necessary for the plaintiff to locate correctly, not only the tract of land claimed, but the spot within the lines of such tract, whereon the trespass was committed, and of which the plaintiff complains, and to such spots his proof must be confined.

Places of trespass, of which the explanations are silent, cannot be proved.

In an action of *trespass q. c. f.*, or in any action where the location of land is necessary to elucidate the matters in controversy, the issuing of a warrant of resurvey will be ordered; and the surveys and locations to be made under it are for the most part the same with those which are made in an action of ejectment, except, that they are not pleadings in the cause. The issue is not joined on the plats, but the plats are used by way of evidence and illustration in the trial of the issues joined in the pleadings. **PER DORSEY, J.**

- If the action be trespass, and the plaintiff intends to rest his right of recovery upon *possession*, he must locate it upon the plats, or he can give no evidence thereof; and he must also locate the place where the trespass was committed. On the trial he will not be permitted to prove the trespass in any other place, nor in violation of any other part of his possession, than that located. *Ibid.*
- If the defendant design to traverse the possession, and to prove the acts complained of, as committed in any other place than where the plaintiff has located them, he must make a counter-location of the plaintiff's possession, and locate the *locus in quo* as alleged by him, or he will be assumed to have admitted the possession as located by the defendant, and that the act complained of committed no where else. *Ibid.*
- If the plaintiff rely upon *title* as the basis of his right to recover, the muniments of his title must be located upon the plats, with as much particularity as if the proceeding were an action of ejectment for the recovery of the land on which the trespass was committed. *Ibid.*
- When a defendant desires to put a plaintiff upon proof of his locations, or disprove them, he must make a counter-location thereof. *Ibid.*
- Where the defendant seeks to defend himself upon the ground that the title to the *locus in quo* is in some person other than the plaintiff, he must make upon the plats the locations necessary to let in proof of such a defence. *Ibid.*
- It is a general rule, where a warrant of resurvey is issued, that all tracts of land, boundaries, possessions, lines, or *other objects*, of which a party proposes to offer testimony at the trial, should be shown to the surveyor by the witnesses to be examined at the trial, and be located on the plats. *Ibid.*
- To maintain an action of trespass upon the case by a reversioner, it is incumbent on him to make the same location of his title to the land, on which he alleges the trespass to have been committed, that he would have been required to make had he been prosecuting an action of ejectment for the recovery thereof, in virtue of a possessory title thereto. *Ibid.*
- It is to prevent surprise, that objects, of which it is designed to give evidence of their position where a warrant of resurvey has been issued, are required to be located on the plats. *Ibid.*
- Where the *only* notice taken by the surveyor in his *explanations* of a trespass complained of, was as follows: "2 shows where the defendant had timber cut, and is the trespass complained of by the plaintiff;" and upon the plats were located *A.* and several stars not far from it, the explanations and plats being offered in evidence, it is not competent to prove by the surveyor on the trial that he located the trespass at *A.* and the stars near to it, as representing the stumps of the trees cut down, from his own knowledge. *Ibid.*
- Such explanations are defective and insufficient as respects the stars, and the defendant had a right to regard them as unmeaning marks. *Ibid.*
- The explanations of the surveyor should so refer to and describe the locations on the plats, as that their import may be understood by the parties in the cause. If they fail to do this, such locations are of no avail to the parties at whose instance they were made, and no evidence can be admitted to sustain them. *Ibid.*
- The offering of proof to maintain such locations would be a surprise and preju-



dice to him against whom they were designed to operate; the explanations and plats giving to him no admonition to prepare for any such subject of contest. *Ibid.*

Witnesses examined on a survey are permitted to enlarge, confirm, or explain at the trial, their testimony given on such survey. *Ibid.*

The object of such examination is to enable the surveyor to locate upon the plats the several objects pointed out to him by the witnesses, that the parties by the explanations and plats may be notified of the matters in controversy, and that the testimony to be taken on the the trial may be the more easily understood, and applied to the subjects in controversy in the cause. *Ibid.*

The swearing of the witnesses on the survey is not intended for the benefit of the party against whom they are offered, and therefore he has no reason to complain of its omission. *Ibid.*

Witnesses sworn, or not sworn on the survey, must all be sworn on the trial, and may be there examined and cross-examined with perfect freedom,—*provided*, that when testifying on the subject of locations, their testimony be confined to such objects located on the plats, as were by them shown to the surveyor on the ground. *Ibid.*

The taking of depositions on the survey was designed to confer a contingent benefit on the party by whom the witnesses are produced. It is a rule of expedience, not of indispensable obligation, though it is usual. *Ibid.*

It is no ground for the rejection of a witness where a warrant of resurvey issues, that he was not sworn nor examined on the survey, nor that his evidence would be a surprise upon the party against whom it is offered. He can give evidence of no object not located on the plats, nor of any object not shewn by him to the surveyor. In relation to such located objects, he may give proof otherwise competent. *Ibid.*

No object located upon the plats can be established by the testimony of a witness, who has not upon the ground shown it to the surveyor. The time and occasion on which such showing takes place, is not essential to the validity of the location, or the admissibility of the evidence to sustain it, provided it takes place before the surveyor returns his plats to the court, and the location be intelligibly made thereon, and the requisite description thereof be given in the explanations. *Ibid.*

By explanations and plats in the cause, the parties are notified of the intention to examine a witness, and of the purpose *as respects mere locations*, for which he is to be examined. Proof of locations under such circumstances can work no surprise. *Ibid.*

It has been usual to examine the surveyor by whom the survey and plats were made, in relation to any matters occurring on the survey, or any locations intelligibly made upon the plats.

But when he undertakes to make locations resting on his own personal knowledge, not acquired by any thing transpiring on the survey, then the objects of which he is to give testimony should be as distinctly located, and the nature thereof, and the names of the witnesses, &c. by whom they are to be proven, be as fully disclosed by the explanations, as if the locations had been made upon the testimony of any sworn witness upon the survey.

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Funk vs. Hughes.—1847.

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APPEAL from *Washington* County Court.

This was an action of *trespass upon the case* brought on the 27th January, 1844, by the appellee against the appellant. The appellee declared for a reversionary interest in land leased out by her. The appellant was the owner of a mill below the demised premises, on a stream which flowed through both tracts, and increasing the height of his dam, forced the water out of its natural and customary channels back upon her estate, and flooded a spring and destroyed a ford across the stream. And also for cutting down divers trees upon her leased land, &c. The defendant pleaded not guilty.

A warrant of resurvey was issued to locate the acts of trespass, which was executed and returned with depositions, and a plat of the land, on which the letter "A." "showed where the defendant had timber cut, and is the trespass complained of by the plaintiff."

The plaintiff to support the issue on her part joined, under the pleadings in this case and the plats returned and filed, offered in evidence the last will and testament of *Robert Hughes*, deceased, to wit:

"I give and bequeath to my wife *Susannah* all my real and personal property during her life and widowhood, with full right to dispose of the same or any part thereof for the payment of my debts, or to any of my children, at an appraisement, so that each of my children shall enjoy and possess an equal share of my property, both real and personal. I leave my wife my sole executrix, in full confidence that she adjust and manage all matters relative thereto to the mutual advantage of my family. I empower my said wife to make all necessary conveyances to carry my said will into effect."

It being admitted that he died about the year 1829, without having revoked or altered the same, and that the plaintiff is the widow of said testator.

The plaintiff then offered to prove by *Marmaduke W. Boyd*, the surveyor of *Washington* county, that about two years ago, he was standing near the place marked A. on the plats, between the letters I. and J. with the defendant; that certain trees, some

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six or eight, were cut down, and the tops of them were then in their view, not yet cut up or removed, and the timber looked as if it had not been cut more than six or eight months before, and that the defendant admitted to him that he had had the said trees cut down. He did not point out any particular trees or stumps, but admitted generally that he had had the trees, the stumps of which were then in their view, cut down. That in the recent survey made in this case, when the defendant was present, he denied to the witness that he had had said trees cut down. That witness further proved, that when he was making said survey, as shewn by the plats, he was not instructed by the plaintiff or her counsel, to locate any particular trees or stumps of trees as the trespass complained of, but merely directed in general terms to locate the trespass; *that there was no witness on the survey sworn as to any trespass*; or that pointed out to him the places where the trees were cut; or swore to any place or places where the defendant had cut any trees or committed any trespass. That the stars on the plats, around, near the letter A. were placed there by him, *as the surveyor*, to show the stumps of the trees cut by the defendant, as admitted to him by the witness, by the defendant two years before, as hereinbefore stated, but that *he was not sworn on said survey as a witness, nor did he in the presence of said defendant or his counsel, point out said places on the ground as a witness*, as the places where the said trespass complained of was committed, nor did he inform the defendant or his counsel that he, the witness, intended to place on the plats those particular points as designating the trespass, nor does he know that either the defendant or his counsel knew that he had made any running, or taken any measurements or bearings for the purpose of designating said points on the plats, *but that he did the same to enable him to shew with certainty the places where said trees had been cut down, should he be sworn and examined for that purpose on the trial in open court.*

The defendant by his counsel objected to the competency of said witness to point out to the jury the crosses, stars or spots so placed by him on said plats, as the places where the said

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trespass complained of was committed by the defendant, as admitted by the defendant to the witness two years before said survey, as hereinbefore stated, on the ground that the said witness had not been sworn as such on said survey, and had not been examined on the ground as to said places; nor had he, as a witness sworn and examined on the ground, pointed out said places in the presence of the defendant or his counsel, nor had the defendant or his counsel any notice that he was to be a witness for any such purpose, or had they any opportunity to cross-examine him in relation to the same, on the ground and at the places designated; that although the said *Boyd* was on the ground at the time of the survey, he was not there as a witness, or sworn or examined as such, but was there merely in his capacity as the surveyor of *Washington* county, for the purpose, and only for the purpose, of executing said survey under the warrant issued, to him directed as such surveyor; and that as there was no witness offered, produced or sworn on the ground, or examined at the place or places of the trespass complained of, or that there was any trespass committed by the defendant on the land of the plaintiff, that it would be a surprise on the defendant now to permit said *Boyd* to point out and show to the jury the said stars or marks on the plats as the places to which his testimony as to said admissions by the defendant to him was to apply, and to be considered as located on said plats, that said *Boyd*, though the surveyor of the county could not be used by the plaintiff as a witness to prove the place or places where said trespass complained of was committed, or point the same out to the jury on said plats, unless, like any other witness, he had been sworn on the ground as a witness, and as such witness had on the ground pointed out and designated in the presence of the parties, plaintiff and defendant or their counsel, the said places or points as the places where the said trees were cut down and said trespass complained of was committed, and so that the defendant or his counsel might have had the opportunity of cross-examining such witness on the ground in relation thereto. But the court (MARTIN, C. J., BUCHANAN and MARSHALL, A. J.,) was of



opinion that said *Boyd* was a competent witness for the purpose aforesaid, overruled the said objections and suffered his said testimony to go to the jury as legal and competent evidence for the plaintiff to prove the trespass and the places where the same was committed, to which opinion of the court and their admission of said testimony so objected to by the defendant, he, the defendant, excepted.

The verdict being for the plaintiff, the defendant prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By F. A. SCHLEY for the appellant, and

By ROMAN and PRICE for the appellee.

DORSEY, J., delivered his opinion as follows :

In an action of trespass *quare clausum fregit*, or in any action where the location of land is necessary to elucidate the matters in controversy, the issuing of a warrant of resurvey, on the application of either plaintiff or defendant, will be ordered by the court, and the surveys and locations to be made under the warrant are, for the most part, the same with those which are made in an action of ejectment, except that they are not the pleadings in the cause ; the issue is not joined on the plats ; but the plats are used by way of evidence and illustration in the trial before the jury, of the issues joined in the pleadings in the cause. And they, in a great degree, control and limit the proof to be offered by the parties ; as much so, perhaps, as if the issues were joined thereon, and they had formed a part of the pleadings in the cause.

If the action be trespass, and the plaintiff intends to rest his right of recovery upon his *possession* of the land, on which the alleged trespass was committed, he must locate upon the plats his possession, or he can give no evidence thereof ; and he must locate also the place where the trespass was committed ; and on the trial, he will be permitted to prove the

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trespass in no other place, and in violation of no other of his possessions, than that located on the plats. If the defendant design to traverse the *possession*, and to prove the acts complained of as committed in any other place than where the plaintiff has located it, he must make a counter-location of the plaintiff's possession, and locate the *locus in quo* as alleged by him, or he will be assumed to have admitted the possession as located by the plaintiff, and that the act complained of was committed no where else, and then the only question left open for proof before the jury, is the fact of the trespass as alleged.

If the plaintiff rely upon his title to the *locus in quo*, as the basis of his right to recover, the muniments of his title must be located upon the plats, with as much particularity as if the proceeding were an action of ejectment for the recovery of the land on which the trespass was committed. To this necessity he is driven by the issuing of the warrant of resurvey, which precludes him from offering evidence of any other title than that located upon the plats. Should the defendant desire to put the plaintiff upon the proof of his locations, or to disprove them, he must make a counter-location thereof. And should the defendant seek to defend himself upon the ground that the *title* to the *locus in quo* is in some person other than the plaintiff, he must make upon the plats the locations necessary to let in the proof of such a defence.

The plats are substituted for the view in *England*; and it is a general rule, that all tracts of land, boundaries, possessions, lines, or other objects, of which a party proposes to offer testimony at the trial, should be located on the plats, and shown to the surveyor by the witnesses to be examined at the trial, to sustain them. Such locations are required, that the opposite party may be apprised of the several matters on which testimony may be adduced, and that the testimony on the trial in relation to them, may be understood by the court and jury, and applied to the plats, with the aid of the surveyor, or his explanations accompanying the plats. By such a requisition as to locations, the parties are never taken by surprise by the introduction of new subjects of controversy, of which they had no

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previous monition, and therefore could not be expected to have come prepared with the appropriate testimony to meet the questions for litigation incident thereto.

To maintain the present action, it is incumbent upon the plaintiff to make, upon the plats in the cause, the same location of his title to the lands, on which he alleges the trespass to have been committed, that he would have been required to make, had he been prosecuting an action of ejectment for the recovery thereof, in virtue of a possessory title thereto.

The only notice taken by the surveyor in his explanations (accompanying his plats) of the trespass complained of in the third count of the plaintiff's declaration, was as follows: "2 shews where the defendant had timber cut, and is the trespass complained of by the plaintiff." Upon the plats A. was located and several stars were also located not far therefrom.

The plats and explanations being in evidence before the jury, the plaintiff "then offered to prove by the surveyor who executed the warrant of resurvey and returned the plats in this case, that he was directed by the plaintiff to locate the trespass complained of in the third count of the plaintiff's declaration, as to the felling and cutting down trees; that no witness was before him who pointed out to him where the trespass was committed; or the stumps of the trees cut down marked on the plats by the stars near to A.; that he located the trespass at A. and the stars near to it as representing the stumps of the trees cut down from his own knowledge; the defendant himself, about two years before, whilst he and the witness were standing at or near where he has located the trespass and the stumps, having admitted that he had the trees cut down." The witness stated that he was not sworn on the survey as a witness, nor did he in the presence of the defendant or his counsel, point out the places where the trespass was committed, or inform the defendant or his counsel that he intended to make such locations of the trespass, or had made any running or measurement for that purpose; but that he made the said locations as to the said trespass, that he might be enabled to show with certainty the places where said trees had been cut

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down, should he be sworn and examined for that purpose on the trial.

To the testimony thus offered, the defendant objected on the ground that the witness had not been sworn on the survey, and had not when sworn and examined on the ground, pointed out the place where the trespass was committed, in the presence of the defendant or his counsel; nor had the defendant or his counsel any notice that he was to be a witness for any such purpose, or had they any opportunity to cross-examine him on the ground and places designated; that although the surveyor was on the ground at the time of the survey, he was not there as a witness, or sworn or examined as such; that the said surveyor could not be used as a witness by the plaintiff to prove the place where the trespass was committed, or point out the same to the jury, unless like any other witness, he had been sworn on the ground as a witness, and pointed out in the presence of the parties, plaintiff and defendant, or their counsel, the place where the trees were cut down and the trespass committed, so that the defendant or his counsel might have had an opportunity of cross-examining the witness.

As well from the arguments of the counsel in this cause, as from his reasons assigned for the rejection of the testimony offered in the court below, it is manifest that the principles which control the admissibility (on the trial) of the testimony of witnesses, offered to prove or disprove locations made upon the plats, are not properly understood. The learned judge, who delivered the opinion of this court in the case of *Mundell vs. Perry, 2 Gill & John*. 205, (an action of trespass *quare clausum fregit*) states with his usual perspicuity, "that the object and intention of introducing plats in the cause, is to give certainty to the claim and defence, and to apprise the parties that the locations of other lands are to be used to illustrate and support the locations of those under which they claim title. It is to prevent surprise, and therefore, it has been the uniform practice of courts to reject evidence as to any object, unless it is located on the plats."



In *Carroll vs. Norwood*, 1 H. & J. 177, a witness who had been examined on the survey, and who gave testimony as to a line of fence and its termini, which were located upon the plats, was at the trial called as a witness to prove that a gum tree marked as a boundary stood in the line of said fence, near one of its termini. The testimony being objected to, the court in its opinion delivered by CHASE, C. J., say, "that inasmuch as the gum tree, or the place where it stood, is not located on the plats, the evidence offered is inadmissible, and cannot legally be received." And a similar principle was determined in the same case in page 183, and in other cases, to which it is unnecessary to refer in support of so familiar a proposition.

The explanations of the surveyor should so refer to and describe the locations on the plats, as that their import may be understood by the parties in the cause. If they fail to do this, such locations are of no avail to the parties at whose instance they were made, and no evidence could be admitted to sustain them. Were it otherwise, the offering of proof to maintain such locations, would be a surprise and prejudice to him against whom they were designed to operate. The plats and explanations giving to him, no admonition to prepare for any such subject of contestation. The object sought to be attained by the production and examination of the witnesses on the survey, was not to notify the opposite party of the number of the witnesses and the precise nature of the testimony which his opponent would array against him on the trial. If it were so, the witnesses would not be permitted to enlarge, confirm or explain their testimony given on the survey. Nor could the surveyor even receive the title papers of the party, with instructions to locate them, unless publicly delivered to the surveyor at the time of the survey. The object of such examination of the witnesses is to enable the surveyor to locate upon the plats the *several objects* pointed out or shown to him by the witnesses, that the parties, by the plats and explanations may be notified of the matters in controversy, and that the testimony to be taken on the trial may be the more easily understood, and applied to the subjects in controversy in the cause.

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Nor is the swearing of the witnesses on the survey intended for the benefit of the party against whom they are offered; and therefore, he has no reason to complain of its omission; he sustains no injury thereby. Sworn or not sworn on the survey, they must all be sworn on the trial, and may be examined and cross-examined with perfect freedom, unrestricted by any thing to which they may have deposed on the survey, provided, that when testifying on such subjects their testimony be confined to such objects located on the plats, as were by them shown to the surveyor on the ground. The taking of the depositions of the witnesses on the survey was designed to confer a contingent benefit on the party by whom the witnesses are produced.

In the language of Judge EARLE, who delivered the opinion of the court in *Stoddert vs. Manning*, 2 Har. & Gill, 158, “the usual course is to examine a witness on the survey, and to take his deposition *de bene esse*,” that is, the depositions are taken on the survey, to be read in evidence on the trial, in case of the death of the witness, of his becoming mentally or physically incapacitated to testify at the trial, of his removal out of the State, of his being convict of some crime which would disqualify him as a witness, or if from any uncontrollable cause his testimony at the trial could not be procured.

As stated by Judge EARLE, the usual course is to examine the witnesses on the survey; but as the language of the Judge clearly imports, it is a rule of expedience, not of indispensable obligation. And this interpretation thus given to this rule or course of examining witnesses on the survey, is still more apparent by what the court in its opinion subsequently said. “By *Thomas Burgess* being on the ground at the time of the survey, at the boundary *B.*, when he was called upon to give evidence, no mistake can arise as to the place at which he was required to prove the boundary, and his testimony on the trial can be as well understood, as if it was a repetition of what he had previously sworn in the country. Nor can we perceive that the offer to swear him could produce any surprise on the opposite party, as the intention to make him a witness to a particular and designated boundary, was explicitly avowed on

the execution of the warrant. For these reasons we are of opinion, that his testimony, on the trial, ought not to have been rejected on the ground that he was not a sworn witness on the resurvey." "*Thomas Burgess* declined to give evidence of the boundary B.; although in the execution of the warrant of resurvey, he was at the place where it stands, and was called upon by the plaintiff to testify in relation to it."

The rationale of the rule requiring the examination of witnesses on the survey, is, in this opinion of the court, plainly disclosed. Having decided that *Thomas Burgess*, the witness, whose testimony was rejected by the court below, was a competent witness for the purpose for which he was offered, the Court of Appeals proceeds to state the grounds upon which their decision is founded. That the witness "being on the ground at the time of the survey at the boundary B., where he was called upon to give evidence, no mistake can arise as to the place at which he was required to prove the boundary; and his testimony, on the trial, can be as well understood as if it was a repetition of what he had previously sworn in the country."

We have before shown, that it is no ground for the rejection of a witness, that he was not sworn on the survey. Is it of itself a sufficient reason for rejecting his testimony—that he was not examined on the survey, is the next inquiry. If the witness, when sworn on the trial, could state no fact that was not contained in his deposition on the survey; or in other words, could make no statement of facts but that made by him, on his examination on the survey, it would follow as a corollary, that a witness not examined on the survey was incompetent to testify on the trial, because the parties would otherwise be deprived of the opportunity of examining and cross-examining the witness. But there is no such restriction imposed upon the examination of a witness at the trial. The only restriction is, that he can give evidence of *no object* not located on the plats, and by him shown to the surveyor. But in relation to such *located objects* he may, on the trial, prove he has heard both plaintiff and defendant fifty times admit, whilst standing at those objects, that they were what he represents

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them to be; that he has seen fifty surveyors, fifty years before, and at different times, running from those objects, as what he represents them; and has been shown them by a hundred old persons then deceased, as the objects he, to the surveyor, has represented them to be. And such testimony he may give on the trial, although in his deposition or in his examination on the ground upon the survey, he may never have disclosed any other fact of which he testifies, than pointing out to the surveyor the objects and their character, of what the surveyor subsequently locates upon the plats, and describes in his explanations.

Unless it be on the ground of surprise it is manifest, as well from reason and principle, as from the court's opinion in *Stoddert vs. Manning*, that neither the swearing nor examination of a witness on the ground, and upon the survey, is an imperative requisition to the competency of a witness to testify as to locations upon the plats. No object located upon the plats can be established by the testimony of a witness, who has not upon the ground shown it to the surveyor. But the time and occasion on which such showing takes place is not essential to the validity of the location, or the admissibility of the evidence to sustain it; provided it take place before the surveyor returns his plats to the court, and the location be intelligibly made thereon; and the requisite description thereof be given in the explanations accompanying the plats. And this view of the subject is strengthened by the decision of this court, on the fourth bill of exceptions in the case of *Stoddert vs. Manning*, where it is said: the "court below certainly erred in admitting to the jury the evidence mentioned in the fourth bill of exceptions. *Giles G. Craycroft* was not on the survey, and did not show to the surveyor the division line, designated by the letters I. K. on the plats, and his testimony in reference to it ought not to have been laid before the jury." The court thus clearly intimate that to exclude the evidence offered, two things were necessary: that the witness had not attended the survey, and had not shown to the surveyor the division line. The inference from which is, that had the witness shown the division line to the surveyor, he would have



been a competent witness to prove it; although it had been shown before or after the survey.

What is the object sought to be obtained by requiring a witness to show, upon the ground, to the surveyor those boundaries, lines, fences, enclosures, places of the trespass, &c., of which the witness, on the trial, is intended to give evidence? It is that the surveyor may so locate them upon the plats, and describe them in his explanations, that they may be intelligible to the court, the jury, and the parties; so that they may readily understand, and apply to them the testimony of the witness when given on the trial. Can it be of the slightest importance to the accomplishment of such object, whether the showing to the surveyor was at the time of the survey, or at any subsequent time? Assuredly not. Suppose for example sake, a witness by some controlling necessity was prevented from sooner attending, and did not reach the ground until half an hour after the survey had been closed: the sheriff and parties having retired; but the surveyor, chain and pole-carriers should for any cause (and many might be stated) have remained on the ground, and the witness thus arriving should show to the surveyor a boundary already pointed out by other witnesses; and also another not shown by any other witness: and the surveyor were to make the same locations on the plats, and the same explanations, that he would have made, had the witness been sworn and examined on the survey, except that he appeared upon the ground half an hour after the closing of the survey; and the case were on trial before the court and jury, would the testimony of the witness, under such circumstances, be rejected? If it would there is no truth in the legal axiom—"that the reason of the law is the life of the law."

Ought the testimony of such a witness to be rejected, on the ground, that its reception at the trial would be a surprise upon the party against whom it is offered, is the next question to be considered. By the plats and explanations in the cause, the parties are notified of the intention to examine the witness, and of the purpose as respects mere locations for which he is to be examined; and it would be an unmerited reproach

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upon the profession, an imputation of gross dereliction of professional duty, to doubt that the counsel on both sides had made themselves acquainted with the plats and explanations in the cause before the jury were sworn. How then could the admission of such evidence on the trial be regarded as a surprise upon the party against whom it is offered, or unjustly prejudice his rights? He was by the plats and explanations in the cause fully apprised of its existence, and of the intention to offer it in proof to the jury; he knew that the court, on his application, would unhesitatingly have granted him a continuance of the cause, with leave to add to, and amend the plats, if he had desired it, for the purpose of showing the incompetency of the witness, by locating his possession of, or title to, any lands, which proved his incompetency; or for the purpose of counter-locating any location made by the surveyor, upon the showing of the witness. If neglecting to pursue a course so obviously reasonable and just, a party were to go to trial, with no colour of truth or justice could he ask a rejection of the testimony on the ground of surprise; and with much more propriety might the party offering the testimony insist, that the rejection thereof, would be a fraudulent surprise practised upon him.

Some confusion on such subjects, as that now under consideration, has resulted from the inartificial manner in which objections have been raised to the competency of witnesses to give evidence as to locations upon plats. And this inaccuracy in propounding such objections, has arisen from the fact that it is the usual course to swear and examine all witnesses attending on the survey, on whose testimony locations have been made on the plats. And that from the surveyor's rarely, if ever, being upon the ground, at any other time than whilst making the survey, no locations could have been made by him, but upon the showing of witnesses sworn and examined upon the survey. It is, therefore, not unusual where a witness, who has not been sworn, examined, or in attendance on the survey, and has never shown on the ground to the surveyor, any object located on the plats, is offered to prove such a location, to object to his testimony "because he was not sworn on the survey, or

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because he was not examined on the survey;" for the court to rule good the objection, without any distinct consideration of the questions, whether the objection was sustainable because the witness was not sworn on the survey? or because the witness was not examined on the survey? or because the witness had not shown upon the ground the object located on the plats, as to which the witness was offered to testify? That neither of the *two first grounds* are sufficient to exclude the testimony, it has been, it is believed, sufficiently shown in the preceding part of this opinion; that the *last ground* is an unanswerable objection to the admissibility of the testimony nobody can doubt.

The views hereinbefore expressed appear to derive support from the decision of this court, in the case of *Wall vs. Forbes*, 1 Har. & Gill, 444, where it is said: "as a general rule, a person who has neither been examined upon, nor attended a survey, is not a competent witness to give evidence at the trial of a cause, in relation to the locations made upon the plats; and we can perceive nothing set out in the bill of exceptions, to take this case out of the rule."

But suppose it had appeared to the court, that the witness though not examined upon the survey, nor an attendant upon it, had, with a view of giving testimony in the cause, been upon the ground with the surveyor, and pointed out to him the objects to be located on the plats, in regard to which he was to be examined on the trial; and that these facts as plainly appeared upon the plats and explanations, and were thereby as fully made known to the parties as if the witness had been sworn and examined upon the survey. Is it not manifest from the court's opinion in *Wall vs. Forbes*, that it would have admitted the testimony? that the court would have perceived something in the bill of exceptions to take such a case out of the rule. If such a statement of facts, in a bill of exceptions, would not take a case without the rule, upon the principles on which plats and explanations have been resorted to in the trial of land causes, it would be most difficult to conceive, what statement of facts would have that effect. It certainly furnishes much

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stronger ground for an exception to the rule than that recognized as such in *Stoddert vs. Manning*.

Nor is the principle contended for obnoxious to the objections suggested to it, that it would tend to enhance the costs, and delay the time of the trial of the cause. Its adoption could lead to no such result. The same delay and costs would be produced by a continuance on the suggestion of the defendant, that would follow its continuance on the suggestion of the plaintiff. If then, to sustain locations made on the showing of a witness not examined on the survey, the testimony of the witness were inadmissible, the party offering him must resort to a continuance of the cause, as the only means of obtaining his testimony: and in that case, precisely the same delay and expense would be encountered, that would ensue, had the testimony been admitted, and the continuance been granted, at the instance of the opposite party. But suppose as might most frequently happen, that the testimony of the witness, though important to the party offering it, if admitted, should require no other or counter-location by the party against whom it is adduced. What then would be the result of its rejection? The answer is obvious. The parties would be unnecessarily subjected to the costs and delay incident to the continuance of their cause. So far, therefore, from augmented costs and delay resulting from the doctrine sought to be maintained, such a result cannot be produced by it; and its manifest probable tendency is to diminish both the time and costs of the litigation.

That a witness may be competent to give evidence as to locations on plats, without his being either sworn or examined upon the survey, is distinctly announced in the opinion of this court, in the case of *Wall vs. Forbes*.

What has been already said disposes of the objections (multiplied and presented in so many various aspects,) to the admissibility of the evidence offered by the witness, because he was not sworn on the survey; because he was not examined on the survey; because he did not point out the spot where the trespass was committed, in the presence of the appellee or his counsel, &c. &c.



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It has been usual, it is believed, from the time of the introduction of plats, on the trial of land cases in courts of law, down to the present period, to examine, when offered by either party, the surveyor, by whom the survey and plats were made, in relation to any matters occurring on the survey, or any locations intelligibly made upon the plats; and his examination has taken place without reference to the fact of his being sworn or examined on the survey, or anything appearing in the plats and explanations in relation to the testimony, he might be called upon to give. But where he undertakes to make locations, resting on his own personal knowledge, not acquired by anything transpiring on the survey, expediency as well as justice requires *that the objects* of which he is to give testimony should be as distinctly located upon the plats, and the nature thereof and the name of the witness, &c. by whom they are to be proven, be as fully disclosed by the explanations, as if the locations had been made upon the testimony of any sworn witness upon the survey. By such particularity and fulness of description, the parties have ample opportunity of guarding against surprise, and of using every means in their power of defending themselves against the evidence thus about to be offered.

Thus far, the proffered testimony of the surveyor has been spoken of, as if a proper foundation for its introduction had been laid in the plats and explanations in the cause. But in this respect, the explanations returned with the plats are wholly defective and insufficient. The asterisks located upon the plats, and which the surveyor now offers to prove as the spots where the trespass complained of was committed, upon the face of the plats are unintelligible; and the defendant in the court below had a right to regard them as unmeaning marks, indicating nothing. In the explanations returned by the surveyor, no mention is made of them. Therefore they form no basis for the offering of testimony to explain or support them. Upon the issuing of the warrant of resurvey, it was incumbent on the plaintiff below to locate the trespass, and having, in effect, wholly failed to do so, he is not permitted to offer evi-

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dence thereof, or to recover damages therefor. For being placed in this predicament, the plaintiff has nobody to blame but himself. It was his duty to see that the trespass was properly located and described in the plats and explanations; a knowledge whereof must to him be imputed. Having failed to do this, the natural consequences of his neglect should be visited only upon himself. As a conclusive authority upon this branch of the case before us, see the case of *Mundell vs. Perry*, 2 *Gill & Johnson*, 204.

Of the location of the trespass at A. no proof was attempted to be offered.

In admitting the testimony of the surveyor to explain and support the locations of the stars on the plats, I think the county court erred, and therefore its judgment should be reversed. A procedendo should issue.

MAGRUDER, J., delivered the opinion of this court.

We think that the court below erred, in admitting the testimony of the surveyor of *Washington* county, as stated in the bill of exceptions. The appellee, who was the plaintiff below, claimed damages among other things, for trespass alleged to have been committed by the defendant, in cutting down trees then growing on a tract of land called *Rich Barrens*. If the defendant had simply pleaded not guilty, and issue had been joined thereon, no doubt the testimony would have been admissible, because then the plaintiff would have been entitled to recover damages for any trespass by the defendant below, of the nature described, and committed anywhere within the lines of the tract of land. But plats were deemed requisite, and upon these it was necessary for the plaintiff to locate correctly not only the tract of land claimed, but the spot within the lines of that tract whereon the trespass was committed. This, according to the surveyor's explanations, he did do; for besides locating his land, his explanations refer us to the letter A. as the place where the injury was done. Everything then required to be done by the plaintiff, apparently was done, and for such a trespass as is alleged to have been committed at the letter A. he

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could have recovered damages, provided he could have proved that the defendant committed the trespass complained of there. But no proof of a trespass at A. was offered. The plaintiff, however, undertook to prove by the surveyor, to whose testimony objection was made, that at other and distinct places, and within the lines of the tract of land, the defendant did commit a trespass such as is complained of. It was because this testimony was admitted by the court that the exception was taken.

It is true that there are marks (asterisks) on the plat, which designate the spots, and enabled the surveyor to point to the spots, where he alleges trees were cut down by the defendant. But the plats and explanations nowhere tell us, that of trespasses committed in these places, the plaintiff complains in this suit. On the contrary, she locates as the spot where the trespass was committed, the point A., and by such location (and by no other location) of the trespass, she admits that in this suit she cannot recover, unless she proves that the trespass complained of was committed *there*. The defendant by making no location or counter-location, admits the plaintiff's right to recover, provided she can prove in addition to letter A., the trespass complained of to have been committed by them at letter A. Now if notice had been given to the defendant below, that the trespass, for which damages were sought, in this case was committed not at A., but at the places spoken of by the witness, she might have deemed it necessary to make other locations, which if correct, would have shown that to these places the plaintiff had no title, or he might have been prepared to prove that he had a license to cut down the trees spoken of by the surveyor. The plaintiff's locations then would have deceived the defendant, as they told him that he need not prepare himself to justify the cutting down of any trees at the spots about which the surveyor speaks, because in this suit she does not claim any damages for the trespass of which the witness speaks.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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Farmers and Mechanics Bank et al. *vs.* Wayman and Stockett.—1847.

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**THE FARMERS AND MECHANICS BANK OF FREDERICK CO.,  
THE BANK OF WESTMINSTER, AND ANNE JONES *vs.* HENRY  
WAYMAN AND RICHARD G. STOCKETT.—December, 1847.**

In April, 1826, *I.* transferred to *R.* and *H.*, trustees under the will of *L.*, for the benefit of *A.* wife of *S.*, during her natural life, and after her death in trust for the infant devisees in said will, and pursuant to an order of the Chancellor of 20th January, 1826, certain shares of the capital stock of the *Bank of W.* The books of the bank showed the transfer as above. The bank was incorporated at *W.* in 1815, and in 1821 was authorized to establish an office at *F.* In 1827, the principal bank was transferred by law to *F.*, with a branch at *W.*; the officers at *W.* furnished a list of stockholders to those at *F.*, by which it appeared that the stock stood in the name of *A.* wife of *S.* In 1829, these institutions were declared separate and independent corporations, and in 1830, the stock standing at *F.* in the name of *A.* wife of *S.*, was by them sold and transferred to an innocent third party, without the knowledge of *R.* and *H.* the trustees. After this *S.* died; *A.* administered upon his estate; and it coming to the knowledge of *H.*, one of the trustees, that the bank stock at *W.* had been transferred and sold by *S.* and wife, he applied to her, and she paid him in 1833, through the surviving partner of her husband, \$1000, and in 1842 delivered him certain stocks, then of value as a payment or security for the trust funds disposed of as aforesaid. Some of the stocks turned out of no value. Upon a bill filed against the banks at *W.* and *F.*, the widow and administratrix of *S.* and the purchasers of the stock by *R.* and *H.*, &c. to repair the injury done the trust, *Held*,

1. That *H.*, one of the trustees, having received money and stocks on account of the trust, and being thus liable to account with the trust estate, could not as complainant be entitled to a decree without such accounting.
2. Equity may oblige a complainant to assume the position of a defendant, that justice between the parties may be effectuated; and where the case justifies it, will decree at once without waiting for such change of position.
3. As it did not clearly appear whether the stocks transferred by *A.* to *H.* were in payment, or by way of security, this court considered it premature to decree upon those subjects, but left them for further investigation in the court of Chancery, as well in relation to the principal fund as the interest.
4. The co-complainant and trustee, *R.*, may recover from the administratrix of *S.* in due course of administration, to the extent of assets which have come to her hands, such sum as he may be unable to recover from *H.*
5. The injury which the trust estate has sustained, will be repaired by the payment of a sum equivalent to the price at which the stock was sold, when the transfer was made by *S.* and wife.
6. Such sum should be invested for the benefit of the *c. q. t.* under the will of *L.*
7. For *A.*'s participation in the transfer of the stock, as she was a *feme covert*, under the dominion of her husband, she incurred no penalty or forfeiture of her right as *c. q. t.* for life. She claimed nothing on account of interest; and



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there is no reason why the estate if repaired, may not be increased for the benefit of those in remainder.

Forfeitures are not viewed in a favorable light by a court of equity.

After the accounting by *H.*, and by *A.* as administratrix of *S.*, such a sum shall not be found due from both, as with the funds in court will be sufficient to re-instate the trust estate to the amount of the stock transferred by *S.* and *A.*, then the balance necessary to accomplish this object should be paid by the two banks; and if the decree against *H.* and *A.* should be unavailing to the *c. q. t.* the amount for which they shall be decreed to pay, then the said banks ought to be held responsible for any deficiency that may occur.

Where by a transfer on the books of a bank, the corporation has notice of the trusts with which certain shares of its stock were clothed, and that the complainants were the legal proprietors thereof, the officers of such corporation being trustees of the stockholders cannot, without its being responsible, by any negligence or mistake allow the title to pass to the stock in a transfer by any other person than the trustees.

By the act of 1826, ch. 107, sec. 12, it was directed that books should be kept at *F.*, in which should be fairly entered the names of the stockholders, the amount of stock belonging to each, and that transfers should be made on the books of the bank on proper application by the stockholders. Such a stock list was not kept by the bank; and in consequence of which, the bank as it was then incorporated, consisting of the mother bank at *F.* and its branch at *W.* would have become responsible for any injury which had proceeded from such neglect.

Such a liability having been incurred, the act of 1829, ch. 35, which separated the mother bank and its branch into two independent corporations, does not destroy it.

Each, after the separation, ought to be held liable in equity for the prior neglect of duty, and in proportion to the capital of each; neither, present bank, can throw the whole loss upon the other.

Where there is no knowledge in the trustees of the violation of an express trust, nor in the *cestui que trusts*, no acquiescence can be imputed to them, and hence, lapse of time is no bar in favor of those guilty of such violation.

Where trustees were properly proceeding against parties, who by negligence had permitted the trust funds to be converted, and alienated to innocent and irresponsible parties, the costs incurred by them ought to be allowed out of the trust fund, though the decree was reversed for error in the extent and primary liability of some of the defendants, still it was without costs to them.

This court by the act of 1841, ch. 163, is prohibited from allowing any objection to be urged to the jurisdiction of the court of Chancery, when no such objection was there taken.

### APPEAL from the Court of Chancery.

The bill in this cause was filed by the appellees on the 6th August, 1841, and alleged, that by an order of the Chancellor

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of the 20th January, 1826, and passed in a cause in this court depending, wherein one *Samuel Jones of Joshua*, since deceased, and *Anne* his wife, were complainants, and your present orators, as trustees and executors of the last will of one *Larkin Shipley*, deceased, were defendants, your present orators were directed and required, unless cause should be shown to the contrary, as thereby allowed, to invest a certain sum of money at that time in this Honorable court, to the credit of said cause, in stock of the *Bank of Westminster*, the said stock to be transferred unto and held by and in the name of the said trustees, for the uses, intents and purposes in the proceedings mentioned, and the interest and dividends thereon, as the same may become due and be collected, shall be paid by them unto the said *Anne*, the wife of the said *Samuel*, during her natural life, and after her death the said bank stock shall be disposed of and pass as is directed by the last will and testament of the said testator; that no cause to the contrary having been shewn, and your orator, *Stockett*, having suggested that he had in hand an additional sum of \$1900 belonging to said estate, your Honor by an additional order in the cause, dated on the 18th March, 1826, authorised and directed your present orators, the trustees, to invest the said additional sum of money in stock of the *Bank of Westminster*, upon the terms and as is prescribed by the aforesaid order of the 20th January aforesaid, and the said order is thereby declared to be absolute, and the said trustees are directed to invest the said sums of money accordingly; that in obedience to the aforesaid orders, they did purchase 222 shares of the capital stock of the *Bank of Westminster*, and did procure the same to be transferred unto them as directed by said orders, and having filed their report thereof, your Honor by another order passed in the cause on the 20th April, 1826, ratified and confirmed as by the aforesaid orders and other proceedings in said cause, and now, &c.; that upon the face of said transfer, the fiduciary character of your orators as transferrees, and the authority under which they acted, were fully apparent; that the said *Bank of Westminster* was incorporated and established in the town of *Westminster*, in *Frede-*

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rick county, by an act of the General Assembly of *Maryland*, passed at December session, 1815, ch. 75, and that by one other act of said General Assembly, passed at its December session, 1821, ch. 42, the said Bank was authorised to establish an office of pay and receipt at *Frederick* town in said county, and that by one other act of the said General Assembly, passed at its December session, 1826, ch. 107, the name of the principal Bank is changed to that of the *Farmers and Mechanics Bank of Frederick County*, and is transferred to the city of *Frederick*, and a branch thereof is continued at *Westminster*, as by said acts will appear, and your orators are further informed and so charge, that under the powers conferred on the said corporation by the said acts of Assembly, the transfer books and stock books thereof are placed under the control of the said principal Bank, and that the corporation is now liable to be sued by your orators by its name of the *Farmers and Mechanics Bank of Frederick County*.

And your orators charge that the conjugal relations subsisting between the said *Samuel Jones of Joshua*, and *Anne* his wife, being perfectly cordial, your orators for their convenience permitted the said *Jones and wife* from time to time to draw the dividends declared on said stock, and believing that the stock itself was perfectly secured by the special terms of the aforesaid transfer thereof from any transfer or other application thereof, without the order of this court, they have not intermeddled therewith in any manner. But now so it is; your orators having heard that said stock had been sold by the said *Samuel Jones of Joshua* in his lifetime, and by him actually transferred, forthwith applied for information on the subject thereof unto the present cashier of the *Bank of Westminster*, from whom they received the letters marked Exhibits A. and B., and in conformity with his suggestion, having addressed a letter of inquiry to the cashier of the *Farmers and Mechanics Bank of Frederick County*, they received in answer from him the letter marked Exhibit C., all which, &c. These letters are all addressed to *Thomas S. Alexander*, who had, as solicitor for your orators, made the applications aforesaid to the

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said cashiers, and from all these letters it appears that the said Bank now pretends that on the 14th June, 1830, the said stock was transferred by the said *Jones and wife* as follows, to wit: one hundred shares thereof unto one *William M. B. Wilson*, one hundred shares thereof unto *John J. Wilson*, and twenty-two shares thereof unto one *Jonathan J. Wilson*, unto whom the dividends declared on said stocks ever since the date of said transfers, have been regularly paid.

And your orators aver that no order hath ever been passed by your Honor for the transfer of the said stock, or any part thereof, nor were your orators, or either of them, in any way, directly or indirectly, parties or privies thereto; on the contrary, they aver that they had no notice whatsoever, that any such transfer was made, until within a very few weeks prior to the date of their aforesaid Exhibit A.; and indeed your orators discovered by referring to said exhibits, that the transfer was made by the said *Jones and wife*, not as pretended agents of your orators, but under color of some title in themselves so to do. But your orators are advised to deny the title of said *Jones and wife*, or either of them, so to intermeddle with said stock, and to insist that the transfer so as aforesaid made unto your orators was without notice, &c.; and that the said corporation or the said present transferees ought to account unto your orators for the dividends declared on said stock since the date of said transfers; that the said *Samuel Jones of Joshua*, and *Anne* his wife, had lawful issue—five children—to wit: &c., all of whom are now living and are under the age of twenty-one years, and that said persons, if living at the death of the said *Anne Jones*, will be entitled to the aforesaid principal stock under the provisions of the last will and testament of the said *Larkin Shipley*, deceased, and that the said *Samuel Jones of Joshua*, departed this life sometime in the year eighteen hundred and thirty, intestate, and that administration on his personal estate hath been duly granted by the Orphans court of *Baltimore* county, unto his widow, *Anne Jones* aforesaid, who hath in virtue thereof possessed herself of personal estate to an amount more than sufficient to dis-



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charge the claim which your orators may have against said estate by reason of the aforesaid fraud, and your orators are advised, that if from any cause whatsoever they should be disappointed in obtaining relief as against the said corporation and transferrees, as hereinbefore claimed, they ought at least to have relief as against the said *Samuel Jones*, or his estate, in the hands of his administratrix, for the value of said stock at the time the same was transferred as aforesaid, and the dividends or interest on said stock or value.

Prayer that the transfers of stock may be declared fraudulent and void; that said stock may be decreed to be retransferred unto your orators, and that the said Bank and the said transferrees may be required to account with your orators for all dividends declared on said stock since the date of said transfers, or in case the said transfers shall be held to be valid, then that your orators may be decreed to have satisfaction out of the estate of the said *Samuel Jones of Joshua*, in the hands of his administratrix, for the value of the aforesaid stock, so as aforesaid converted by him, and that your orators may have such other and further relief as their case may require; and for subpoena against the said *Farmers and Mechanics Bank of Frederick County, William M. B. Wilson, John J. Wilson and Jonathan J. Wilson, Anne Jones*, and infant children of *Samuel Jones, &c.*

#### COMPLAINANTS' EXHIBIT A.

*Bank of Westminster, July 1st, 1841.*

Sir:

On examination I have not been able to find the names of either *Henry Wayman* or *Richard G. Stockett*, on the books of this Bank as stockholders or otherwise.

Yours most respectfully, JOHN FISHER, C'r.

*Th. S. Alexander, Esq., Annapolis, Md.*

#### COMPLAINANTS' EXHIBIT B.

*Bank of Westminster, July 9th, 1841.*

Dear Sir:

On the receipt of your first letter, I examined the stock ledger and dividend books, in which the names of the stock-

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holders are entered, and the names of *Rich'd G. Stockett* and *Henry Wayman*, trustees, do not appear on either of these books, and they are the only books to which we refer for the names of stockholders. On the receipt of your letter of the 5th inst., in which you say that *Joshua Jones* transferred the stock, and also give the date of transfer and number of shares, I referred to the stock account of *Mr. Jones* on the stock ledger, and find that he transferred on the 8th day of April, 1826, to *Anne Jones*, wife of *Samuel Jones of J.*, 222 shares of stock. When I found that the date and number of shares of stock agreed with your statement, I referred to the transfer book, to which we never look for the names of stockholders, and there find the transfer to which you refer, a copy of which I annex. The stock was entered on the stock ledger and dividend book in the name of *Anne Jones*, wife of *Samuel Jones of J.*, and not *Rich'd G. Stockett* and *Henry Wayman*, trustees, as from the transfer it would appear it should. Soon after this transfer was made, there was an alteration in the charter of this Bank, by which it was made the *Branch of the Farmers and Mechanics Bank of Frederick Co.*, and this stock was transferred to the mother Bank at *Frederick*. If there has been any transfer of the stock, it must have been done since it has been under the control of the *Bank at Frederick*. You can get this information by application to *Wm. Beall, Esq., Cash'r, Frederick*. If you apply to him, you should state that the stock stood in the name of *Anne Jones*, wife of *Samuel Jones of J.*, or he will not be able to give you the information required. Yours very respectfully,

JOHN FISHER, C'r.

*Th. S. Alexander, Esq., Annapolis, Md.*

COPY. 308. For value received, I do hereby assign and transfer to *Richard G. Stockett* and *Henry Wayman*, trustees, under the last will and testament of *Larkin Shipley*, for the benefit of *Anne Jones*, wife of *Samuel Jones of Joshua*, during her natural life, and after her death in trust for purposes prescribed in said will, and pursuant to an order of the Chancellor, dated the 20th January, 1826, two hundred and twenty-

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two shares of the capital stock of the *Bank of Westminster*, standing in my name on the books of said Bank, on which fifteen dollars has been paid on each share. April 8th, 1826.

Witness.

Signed—JOSHUA JONES.

Signed—J. C. Cockey.

#### COMPLAINANTS' EXHIBIT C.

*Farmers and Mechanics Bank of Frederick Co.,  
Frederick, July 14th, 1841.*

Dear Sir:

I have to state in reply to your favor of the 13th inst., that at the time the separation took place between this institution and its branch at *Westminster*, the stock belonging to *Anne Jones* was under the act of separation, continued in this Bank in the name of *Anne Jones*, wife of *Samuel Jones*. On the 14th June, 1830, the whole stock was sold and transferred by said *Samuel Jones* and *Anne Jones* his wife, to the following persons, to wit:

<i>Wm. M. B. Wilson,</i>	. . . . .	100 shares.
<i>Jno. J. Wilson,</i>	. . . . .	100 “
<i>Jonathan T. Wilson,</i>	. . . . .	22 “
		<u>222</u>

Each transfer was signed by *Jones and wife*.

The stock has always stood in the name of *Anne Jones*, wife of *Samuel Jones*, on the stock ledger and on the dividend book, and I presume was so transferred by *Joshua Jones*, and not transferred by him to the trustees mentioned in your letter.

Yours very respectfully,

WM. BEALL, C'r.

*Th. S. Alexander, Annapolis, Md.*

The answer of the *Farmers and Mechanics Bank of F. C.* alleged that as to those parts of the said bill which speak of former proceedings in this court, in which *Samuel Jones of Joshua*, and *Anne* his wife, were complainants, and the now complainants as executors of *Larkin Shipley*, were defendants, and of the several orders and proceedings had in the said cause, this defendant has no actual knowledge, and prays leave to refer to the said proceedings themselves as the best evidence

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of their contents, and of the legal or equitable rights of the parties therein named; that on the 8th April, 1826, a transfer was made by *Joshua Jones* to the complainants of, &c.; that the copy of said transfer annexed to his Exhibit B. is a true copy thereof; that the *Bank of Westminster*, incorporated by the act of 1815, was established as alleged in the bill, and that by the act of 1821, the said Bank was authorized to establish an office of pay and receipt in *Frederick* town, and that by the act of 1826, the name of the said corporation was changed to that which it now bears, and the principal Bank transferred to the city of *Frederick* in the spring of the year 1827, with a branch thereof at *Westminster*. And this defendant for further answer says, that in execution of the said last mentioned act, the then cashier of the institution at *Frederick* town, on or about the 14th March, 1827, requested the then cashier of the institution at *Westminster* to furnish him with a copy of the list of stockholders, which was accordingly sent to the cashier of the Bank at *F. T.*, on or about the 22d of the same month and year; that upon the receipt of this stock list by the Bank at *F. T.*, a stock ledger was opened in said Bank, wherein each stockholder named in said list was credited with the amount of stock appearing by said list to be standing in his or her name. That it appeared in and by said list so furnished by the cashier of the branch of the said Bank at *W.*, that *Anne Jones*, wife of *Samuel Jones*, was a stockholder to the amount of two hundred and twenty-two shares, upon each of which the sum of fifteen dollars had been paid, and accordingly in the stock ledger before mentioned, the said shares were passed to her credit; that from the period of the establishment of the *office of pay and receipt* at *F. T.* as aforesaid, until the alteration before mentioned was made in the name of the corporation, and it assumed that of the *F. and M. B. of F. C.* in virtue of the act of 1826; the said office was furnished by the parent Bank at *W.* immediately upon the declaration of each dividend, with a list called the dividend list or dividend sheet, containing the names of the stockholders, the number of shares held by each, and the amount of dividend due each stockholder respectively. That from the



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period of the transfer as aforesaid by *Joshua Jones*, until the location of the mother Bank at *F. T.*, the name of *Anne Jones* alone appeared on said lists as a stockholder, and during the same period all dividends declared upon the said stock were paid at the Bank in *W.*, as they continued to be up to the dividend of November, 1829, inclusive, and that the only dividend paid upon the said shares until after their transfer, as hereinafter mentioned, was that declared in May, 1830, which was paid to *Samuel Jones of Joshua*, the husband of the said *Anne Jones*, on the 11th of the then following month of June. And this defendant further answering says, that by an act of the General Assembly of this State, passed in the year 1829, the parent Bank of the said Bank at *F.*, and the branch thereof at *W.* were created and declared separate and independent institutions, upon the terms and conditions therein prescribed, certain of the stockholders of the said institution previously existing, being by the said act declared to be a body corporate and politic, by the name and style of the *F. and M. B. of F. C.*, and certain others of the said stockholders being likewise by the said act declared to be also a body politic and corporate by the name and style of the *Bank of Westminster*, as upon reference to the said act will more fully and at large appear; that the copy of the stock list furnished as before mentioned by the cashier of the Bank at *W.* to the cashier of the Bank at *F.*, and the dividend list or dividend sheet furnished from time to time as aforesaid were the only documents ever received by the latter institution, from which it could have derived or had the means of ascertaining the names of the stockholders. That the original transfer book opened whilst the parent Bank was at *W.*, and in which alone the true character of the transfer of the stock in question was to be found, has always been and is still in that institution; that under all the foregoing circumstances, they had a right to consider, and in truth were bound to consider the said *Anne Jones*, wife of *S. J. of J.*, as the absolute and unrestricted owner of the said stock, with full power and authority to transfer the same, with the concurrence of her said husband. That accordingly on or about the 14th

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June, 1830, the said stock was transferred by the said *S. J. of J. and A.* his wife, to the following persons, that is to say, one hundred shares to *Wm. M. B. Wilson, &c.*; that these transfers were made in the mode usual at this Bank, in virtue of written powers for that purpose, signed by the said *Samuel Jones* and *Anne Jones*; and this defendant most positively avers that at the time said transfers were made, it had no knowledge, nor had any of its officers or servants any knowledge that the complainants, as trustees or otherwise, or any other person or persons had any interest in or control over said stock; and this defendant further says, that though *Henry Wayman*, one of the complainants, soon after the transfer to the said *Wilsons* as aforesaid, called at the banking house of this defendant, and manifested some anxiety when informed of the said transfers, the actual nature of the transaction was not then disclosed by him to the officers and servants of this defendant, who until recently remained in ignorance thereof, the error, if one has been committed, was caused by the acts of the officers of the parent Bank when it was located at *Westminster*, where the evidence to correct the same has always hitherto been and still remains; and this defendant is advised and insists, that as the stockholders of the *F. and M. B. of F. C.*, its officers and agents, had no agency in or were in any way instrumental in the acts complained of, they cannot be held responsible for the same. This defendant admits the death of *Samuel Jones of Joshua* in the year 1830, but they know nothing of the number or names of the children left by him, nor what their rights under the will of *Larkin Shipley* will be after the death of the said *Anne Jones*. This defendant does not know what personal estate the said *Anne Jones* possessed herself of as administratrix of the said *Samuel Jones*; but if, as the complainants allege, the amount of said personal estate is sufficient to discharge the complainants' claim, growing out of the transactions hereinbefore referred to, the remedy of the said complainants, if they have any, would properly be directed against her. And this defendant admits, that since the date of the transfer of said stock to *Wm. M. B. Wilson, &c.*, the dividends

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declared thereupon have been paid to them. And to so much of the said bill as prays for an account of the dividends which have been declared upon the said stock since the said transfer, this defendant insists that the complainants are entitled to no such relief during the lifetime of the said *Anne Jones*, the said dividends being applicable to her benefit during her lifetime, as appears upon the face of the transfer made by said *Joshua Jones*, and she herself having united in the transfer to the said *Wilsons*. But if the Chancellor should think otherwise, and require an account from this defendant of such dividends, then this defendant pleads and relies upon the act of limitations as a bar to all the said dividends which were declared or paid more than three years before the filing of the present bill; and this defendant prays that he may have the full benefit of said plea at the final hearing of this cause, &c.

With the answer was exhibited several schedules, which are unnecessary to be inserted.

The bill was then amended so as to make the *Bank of Westminster* a defendant, a separate institution from the other defendant, as stated in the opinion of this court.

The answer of *Anne Jones* admitted the investment under the orders of the court; the existence of the Banks in their original and separated capacities; the acts of Assembly in relation to said Banks; the receipt of dividends on the said stock by her husband *Samuel*; that she administered upon his estate; that she knows nothing of any transfer of said stock, except that on one occasion, she thinks sometime in or about the year 1830, being with her said husband in the city of *Frederick*, he told her that he had some stock in the Bank there and wished her to go to the Bank and sign her name, adding that it would be an advantage to him and their family, and that he would make it good when they got home, and that she did accordingly repair with him to the Bank and sign her name in a book, but without knowing what stock it was in relation to which he spoke, or that it was the stock in which she had an interest in the *Bank of Westminster*, or asking any questions in relation to the same, and that her said husband never afterwards men-

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tioned the subject to her. And this respondent further answering says, that since her husband's death, which took place in the autumn of the year 1831, she has found among his papers, one of which, that herewith annexed, marked defendant's Exhibit A. J., No. 1, is a copy, but that she never saw the same, nor was its existence communicated to her in his lifetime; that there have been no assets of said estate received by her except those above set forth, and except also some stock in one of the Banks in *Baltimore*, and in a Savings Institution there, which stock was claimed by one of the complainants as part of the trust fund, and has been accordingly transferred to, and as she is informed and believes is now held by them, and she denies therefore the existence of assets to meet the claim set up by the said bill; that the notice required to be given by law to parties having claims against said estate, was by her duly given, and that no debts or claims were either known or notified to her to exist against said estate at the time of the payment and distribution by her as aforesaid; that she denies all fraud, and in bar to the relief prayed, relies and insists as well on the great lapse of time since the transfers therein mentioned and alleged to be fraudulent and void, were made, as upon an act of the General Assembly of the then province, and now State of *Maryland*, passed at April session, 1715, chapter 23, entitled an act for limitation of certain actions for avoiding suits at law, and craves to have the benefit of said statute, and of such lapse of time as if the same had been fully and formally pleaded.

DEFENDANT'S EXHIBIT A. J., No. 1.

\$3100. On demand we promise to pay to *Mrs. Anne Jones*, (wife of *Samuel Jones of J.*) or order, the sum of three thousand one hundred dollars with interest, for value received.

JONES & HARDESTY.

This note was given for money that I received for stock sold in the *Farmers and Mechanics Bank of Frederick County*, belonging to my wife, and is quite separate from the business of the firm; and this memorandum is taken in case of death,



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that is, the money was loaned to the firm on interest, to be returned on demand, and properly *R. J. Stockett* and *Henry Wayman* as trustees to my wife, have the right to receive the same, and invest it for the benefit of my wife according to the will of *Larkin Shipley*, deceased.      SAM'L JONES OF J.

The purchasers of the stock also answered the bill.

The answer of the *Bank of Westminster* denied all fraud—relied on the lapse of time—staleness of the demand, and act of limitations—admitted the various changes affecting the two institutions—insisted upon want of notice and irresponsibility under the circumstances of the *Bank of Westminster* for the transfer by *Samuel Jones*.

The bill was afterwards amended so as to make *Richard G. Hardesty*, a former partner of *Samuel Jones*, deceased, a party in consequence of the allegations in the answer of *Anne Jones*, that he had assets of *Samuel* in his hands, and that the partnership of *Jones & Hardesty* was also bound for the proceeds of this stock according to the memorandum filed with her answer, but it appearing that he had settled with the administratrix and procured a release from her, the bill as to him was dismissed.

A supplemental answer of *Anne Jones* duly filed, alleged that after the death of her husband, the complainant, *Wayman*, informed her that her husband had undertaken to furnish him with twenty-seven shares of *Farmers and Merchants Bank* stock, and had received from him on the faith of such engagement, an amount of trust funds belonging to the complainants sufficient for their purchase, but that he had failed to transfer the stock in his lifetime, and she was bound to make good his said undertaking. This respondent further saith, that having shown to the said *Wayman* not long after her husband's death, the note of *Jones & Hardesty*, referred to in her original answer, he said that the affair which it disclosed would injure her husband's memory, and that she must give him some stocks as a security, which he learned belonged to the estate of her husband. This respondent further saith, that upon the representations and at the request above mentioned of the said *Henry Wayman*,

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she did on the 13th March, 1842, transfer 40 shares of stock in the *Maryland Savings Institution*, worth on that day and saleable for \$1040, to the said complainants in trust, and also 34 shares of *Farmers and Merchants Bank* stock of the par value of \$50, and that the same have ever since stood on the books of said Institutions in the names of the said complainants.

This respondent further saith, that on the 18th April, 1833, the said *Henry Wayman* also received from *Richard S. Hardesty*, the surviving partner of the firm of *Jones & Hardesty*, the sum of \$1000, and gave therefor a receipt in the words and figures following, to wit:

“Received *Baltimore*, 18th April, 1833, of *Jones & Hardesty*, by the hands of *Richard S. Hardesty*, one thousand dollars, being part of the money due *Mrs. Anne Jones*.

HENRY WAYMAN, *Trustee*.”

But that the same was done without her knowledge or authority.

This respondent further saith, that the reason why the facts above mentioned do not appear in her original answer, is that her recollection of them at the time she gave the necessary information to her solicitors to enable them to draw it, was vague and indistinct, and entertaining the impression that they were not important to the present controversy, she took no pains to refresh her memory; but that having since in a conversation with her solicitors found that they were of moment, and that justice to her co-defendants, as well as to herself, required her to furnish the record, with all that she could ascertain on the subject, she has consulted all the sources of information at her command, and is thus enabled to make this detailed and accurate statement.

The *cestui que trusts* in remainder, infant children of *Samuel Jones*, also answered, when a commission was issued to take proof, but as the points ultimately decided by this court do not involve a consideration of the evidence, it is unnecessary to report it further than it is assumed and stated in the opinion of this court.

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At September term, 1845, the Chancellor (BLAND) decreed that the *Farmers and Mechanics Bank of Frederick County* forthwith assign and transfer according to law, 222 shares of the stock of the said Bank unto the plaintiffs, *Henry Wayman* and *Richard G. Stockett*, to be held by them in trust as specified by the said order of this court of the 20th January, 1826. That the said bodies politic—the *Farmers and Mechanics Bank of Frederick County* and the *Bank of Westminster*, and the said *Anne Jones* for herself, and as administratrix of *Samuel Jones of Joshua*, deceased—account with the said plaintiffs of and concerning their said claims, as set forth in their said original and amended bills of complaint; that this case be and the same is hereby referred to the auditor, with directions to state an account or accounts accordingly from the pleadings and proofs now in the case, and from such other proofs as may be laid before him. In which account the auditor will estimate the stock herein directed to be transferred at its par value of fifteen dollars per share; and he will then charge the said administratrix with the whole amount for which her intestate sold the said stock, and the dividends which have been declared on that number of shares after the day of the said transfer, and before the day when the transfer shall have been made to the said plaintiffs as herein directed, so as to shew the amount with which the said Banks are chargeable, over and above the par value of the said stock, as well as the amount for which they are entitled to obtain reimbursement from the estate, if any, of the said *Samuel Jones of Joshua*, deceased, and the amount of the dividends of the said quantity of stock which might have been received and paid over to the said *Anne Jones*, but for her having improperly united in the grossly fraudulent transfer so as aforesaid made by her and her husband, together with the profits made by the said sale of the said stock above its par value, must be awarded to the said trustees, to be by them invested in their own names in trust as aforesaid, and as it was owing to the fraud or blunder of the then *Bank of Westminster*, that in the year 1826, the legal title to the said stock was not truly placed upon its books in the name of the plaintiffs, *Wayman* and

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*Stockett*, as that institution was bound to have done, according to the express terms of the power of attorney then presented to it for that purpose, it became chargeable by having thus improperly left the way open for *Jones* and wife to perpetrate the aforesaid gross fraud, by the said transfer of the 14th June, 1830, and therefore the auditor will state the whole amount of the liability of the said defendants, and then apportion the same between the said two Banks as nearly as may be, according to the provisions of the act of 1829, ch. 35. And the aforesaid parties are hereby authorised to take testimony in relation to the said accounts. And it is further adjudged, ordered and decreed, that the said original and amended bills of complaint be and the same are hereby as against the said *Wm. M. B. Wilson, John J. Wilson, Jonathan T. Wilson, and Richard S. Hardesty*, dismissed with costs.

The Chancellor assigned as the ground of his decree, that neither of these banking institutions, either before or since their separation, can be deemed and treated as trustees to any extent, or for any purpose whatever, as by the terms of the legislative enactments under which they or either of them have heretofore acted or may now act, they can have no concern with any other than the legal title to their stock, which alone they have been allowed to place upon their books, and to transfer in the manner prescribed, and such legal title having in this instance been designed and declared to be for the protection of the interests of the *cestui que trusts*, these banking institutions are liable for not having placed upon their books that legal title in the name of these trustees, as the assignees thereof, according to the express terms of the power of attorney under which they acted. The mode of transfer having been prescribed and directed to be made under the supervision of the corporation, it acts at its peril as to the authority of such transfer and all other like consequences. That *Anne Jones* having participated in the fraudulent transfer of the 14th June, 1830, whereby the interests of the *cestui que trusts* in remainder might have been wholly lost, and were certainly put in great jeopardy; she has thus divested herself for the benefit of such



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*cestui que trusts* in remainder of all claim to any dividends after that act, and before its wrong has been repaired. No fraudulent or improper conduct has been proved against the defendants, *Wm. M. B. Wilson, John J. Wilson, Jonathan T. Wilson* and *Richard S. Hardesty*.

From this decree, the defendants (except the *Wilsons*) appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER, and MARTIN, J.

By McLEAN, MAULSBY and McMAHON for the appellants, and

By RANDALL and ALEXANDER for the appellees.

ARCHER, C. J., delivered the opinion of this court.

The complainant, *Wayman*, one of the trustees, having received large sums of money for the purpose of repairing the injury which the trust estate has sustained in the transfer of the stock belonging to the trust estate, and being thus, himself, liable to account with the trust estate, for the moneys thus by him received, could not as a complainant be entitled to a decree without such accounting.

The authorities cited establish the power of the court to cause him to assume a different position in the controversy, and that he might be made a defendant instead of a plaintiff, that justice between the parties may be effectuated.

Such a course would, however, be attended with delay, and we do not deem such a proceeding necessary in this case. In 1 *Keen*, 618, the master of the rolls in delivering his judgment says: "there have been cases in which the court, with the view to substantial justice, has overcome the difficulties arising from a misjoinder of plaintiffs. In the case of *Mosley vs. Taylor* before Sir William Grant, and which is cited in 2 *Young & Jer.* 520, under the name of *Mosley vs. Lord Hawke*, a tenant for life, on whose instigation and for whose benefit a breach of trust had been committed, was joined as plaintiff with the other *cestui que trusts* in a bill against the trustees, who objected to

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any relief being granted in that state of the record; but the objection was overruled, and a decree made against the defendant, and the offending tenant for life, who was one of the plaintiffs." This authority would justify a decree against *Wayman*, one of the plaintiffs, for any sum which may be found to be due from him, without the necessity of a change in the proceedings.

The complainant, *Wayman*, should be made to account for all the moneys received by him, and for the stocks transferred to him in part satisfaction for the wrongful transfer of the property of the trust estate.

It does not clearly appear to us from the proceedings in the cause, in what manner, and in what character, the stock of the Savings Institution was transferred by the administratrix of *Samuel Jones* to him; whether as security merely for the claim of the trustees against the estate of her husband, or in part payment of the same. Nor does it appear to us, satisfactorily, if the same had been transferred merely as a security, and not in payment, whether any act of *Wayman*, for which he could be held accountable, conduced to the loss consequent upon the failure of that institution.

We may likewise observe, that there is some obscurity in the record in relation to the amount of *Farmers and Merchants Bank* stock, which was transferred by *Mrs. Jones* to the trustees, to repair the injury arising from the transfer of the stock of the *cestui que trusts*.

From the above considerations, we think it would be premature to pronounce any judgment in respect to these stocks against *Wayman*, but shall leave this matter for investigation in the Court of Chancery, when the account shall be taken.

We shall also leave open the question, what interest, if any, shall be charged against *Wayman*, as when the account shall be taken, other evidence may be adduced than that which the record before us now furnishes.

For such sum, if any, as upon such accounting shall happen to be due from *Wayman*, he should be held responsible to the trust estate.

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The administratrix of *Samuel Jones* should be held accountable in due course of administration for such sum as the complainant shall be unable to recover from *Wayman*, to the extent of the assets which have come to her hands.

The injury which the trust estate has sustained will be repaired by the payment of a sum, equivalent to the price at which the stock was sold, when the transfer was made by *Jones* and wife.

When a sum equivalent to this shall be paid, it should be invested for the benefit of the *cestui que trusts* under the will of *Larkin Shipley*, as well *Mrs. Jones*, as her children. It is true *Mrs. Jones* participated in the transfer of this stock, but she was a *feme covert* under the dominion of her husband, and ought not on this account to be visited with penalties or forfeitures. She claims herself nothing on account of dividends; but if the fund is made good, we can perceive nothing in her situation, or the circumstances surrounding the transfer, which should forfeit her interests in the trust estate for the purpose of swelling the interests of the *cestui que trusts* in remainder. Forfeitures are certainly not viewed in a favorable light by a court of equity, and of all cases, this would seem to be the least suitable for the application of such a principle.

If in stating the account against *Wayman*, and charging him with such interest as his conduct may justify, the balance found due from him, when added to the sums paid into court, shall be found to be greater than will be necessary to reinstate the trust estate, the surplus thus created should be decreed to *Mrs. Jones*.

If by such accounting by *Wayman*, and by *Mrs. Jones* administratrix of *Jones*, such a sum should not be found due from both, as added to the sum paid into court, will be sufficient to reinstate the trust estate to the amount of the stock transferred by *Jones* and wife, then we are of opinion that the balance necessary to accomplish this object should be paid by the *Farmers and Mechanics Bank of Frederick*, and by the *Westminster Bank*, and that should the decree against *Wayman* or the administratrix of *Jones* be unavailing in yielding to the

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*cestui que trusts* the amount which they shall be decreed to pay, then the said Banks ought to be held responsible for any deficiency that may occur.

In thus determining the ultimate responsibility of the Bank, we proceed to assign the reasons which have conducted us to this conclusion.

It is unnecessary to enquire whether a court of equity could entertain jurisdiction as against the Banks, over the subject matter of this claim, no such question having been raised in the Court of Chancery, and this court being prohibited by the act of 1841, ch. 163, from allowing any objection to be urged to the jurisdiction of the court below, when no such objection was there taken.

The stock in controversy was transferred on the books of the *Bank of Westminster* on the 8th April, 1846, to *Stockett* and *Wayman*, as trustees under the will of *Larkin Shipley*, for the benefit of *Anne Jones*, wife of *Samuel Jones*, during her natural life, and after her death for the purposes prescribed in said will, and pursuant to an order of the Chancery Court, dated 20th January, 1826.

Thus the *Bank of Westminster*, by this transfer, had notice of the trusts with which the stock was clothed, and that the complainants were the legal proprietors of the stock, and its officers being the trustees of the stockholders, could not without making the Bank responsible, by any negligence or mistake allow the title to pass to the stock by a transfer by any other persons than the trustees, without involving the Bank in responsibility.

This Bank continued its operations, but with a change of name to the *Farmers and Mechanics Bank of Frederick*, and with a change of the location of the mother Bank to *Frederick*, and a change of the branch from *Frederick* to *Westminster*.

By the act of 1829, ch. 35, the mother Bank and its branch at *Westminster* were made independent of each other, and on the application of the stockholders each was incorporated as a separate and independent Bank.

By the act of 1826, ch. 107, sec. 12, it was directed that



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books should be kept at *Frederick*, in which should be fairly entered the names of the stockholders, and the amount of stock belonging to each, and transfers should be made on the books of the Bank on proper application by the stockholders.

Such a stock list as was demanded by this law, was not kept by the Bank, in consequence of which the Bank as it was then incorporated, consisting of the mother Bank at *Frederick* and its branch at *Westminster*, would have become responsible for any injury which had proceeded from such neglect; and had the transfer been made before the Banks became independent of each other, by the charters granted to each, by the act of 1829, ch. 35, the responsibility of the Bank as then chartered, would have been beyond all question.

In consequence of the error above adverted to, in not keeping an accurate stock list, the *Frederick Bank* allowed the transfer to be made, whereby the injury complained of has resulted, after the law of 1829, ch. 35, which created the two Banks, separate and independent Banks, and the inquiry is, whether, under such circumstances, both Banks are not responsible?

The act of 1829, ch. 35, by separating the mother Bank and its branch, and creating them independent Banks, did not affect their former liabilities, and such is the express declaration of the act. Now from the omission to form a proper stock list, the injury has resulted to the trust estate. For the consequences resulting from this neglect of duty, the *Bank of Westminster* became liable and remained subject to this liability, upon the change of its name to the *Farmers and Mechanics Bank of Frederick*. This responsibility was in no degree lessened by the separation of the Banks, but each after the separation, ought to be held liable in equity for this neglect of duty, in proportion to the capital of each. The present *Bank of Westminster* cannot throw the entire loss, if any is to happen, upon the present *Farmers and Mechanics Bank of Frederick*, upon the ground that this latter Bank permitted the transfer by *Jones* and wife to the *Wilsons*, because, the cause of that transfer was the neglect of duty in the former Bank, of

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which the *Westminster Bank* was a constituent part, and on this account equity would seem to demand that she should participate in such loss as shall occur from the negligence adverted to.

It has been urged that lapse of time constitutes an available defence for the Banks. To this proposition we cannot agree. So far as the complainant, *Stockett*, is concerned, there is no evidence that he ever knew of the conversion and sale of the stock, until these proceedings were commenced. Nor is there any evidence that the *cestui que trusts* in remainder, were ever aware that they had been deprived of their property by the transfer of the stock, until the institution of these proceedings. There is therefore not the slightest ground to impute acquiescence. Besides, the *cestui que trusts*, except *Mrs. Jones*, had no immediate possessory title to the beneficial interest, and have not yet, as *Mrs. Jones* is still living, and therefore clearly, there could be in this case no bar from lapse of time.

Nor can the Banks claim exemption from the fact that *Wayman* may have been reimbursed. There is no proof that *Stockett* joined in any receipt which may have been given by *Wayman*, or that he, in any manner, ever sanctioned his receipt of the money paid by *Mrs. Jones*.

The decree of the Court of Chancery will be reversed, but without costs, and the cause remanded to that court for further proceedings.

For any costs incurred by the trustees by this decree, they ought to be allowed out of the trust fund.

DECREE REVERSED WITHOUT COSTS, AND CAUSE REMANDED.

## ROBERT WHITE ET AL. vs. JOSEPH WHITE.—December, 1847.

In the year 1814, a partnership consisting of *four* persons, existed. In that year a *fifth* partner was added. In 1825, *one* of the original partners withdrew from the firm. In 1835, *another* of the original partners withdrew. In 1843, the *fifth* partner withdrew, and filed a bill requiring a settlement and account of the partnership concerns from 1814 to 1843, against all the four original partners. To this bill all the original parties demurred, upon the ground of multifariousness. *Held,*

1. That in deciding this question, the attention of the court is confined to the bill itself. It arises upon demurrer, which admits every thing in the bill, properly introduced into it, to be true.
2. The complainant, admitted into a partnership which had previously existed, as a partner, is not responsible for its previous debts.
3. A dissolution of a partnership may be brought about in various ways, and among others by a withdrawal of one of several partners from its business.
4. The partners, who retired in 1825 and 1835, may affirm that this bill is to burthen them with expenses which they are not bound to incur; to swell the pleadings with the state of the several claims, with which they cannot be said to have any connexion after they respectively withdrew.
5. Where an agent of a firm, against whom no decree can be obtained upon the allegations of the bill, is made a defendant with the members of the same, he may demur to the bill as multifarious.
6. A bill should not confound distinct matters, or blend several matters distinct and unconnected, nor demand several matters, of distinct natures, against several defendants.
7. So upon a bill against co-partners for a settlement and account of partnership concerns, a claim to impeach a judgment, and mortgage given by the firm to one of its agents, ought not be included, nor such agent made a party defendant. The agent has a right to have such claim decided alone.
8. When a bill is liable to be dismissed for multifariousness, it ought to be dismissed *in toto*.
9. Where a bill is demurred to, the demurrer overruled, the defendants ordered to answer over or plead by a given day, and failing to answer, a final decree was passed against them, which, among other things, decreed a sale. Under the act of 1841, ch. 11, sec. 1, they may prosecute an appeal.

## APPEAL from the Court of Chancery.

The bill in this cause was filed on the 21st September, 1844, by the appellee, *Joseph White*, and alleged that about the year 1814, he was taken into the partnership, then existing under the title of *John C. White & Sons*, in the city of *Baltimore*,

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and *John White & Co.* in the city of *New York*, both of which firms were composed of *John Campbell White*, *Robert, John*, and *Campbell P. White*, and engaged in the general business of merchants and in the business of distilling; that in addition to an interest or share of the profits, your orator was to be allowed the sum of \$2000 a year, for the extra care, trouble and time he was to give to the business. That your orator accordingly took charge of the said business as the active and managing partner, and so continued, until on or about the 7th March, 1835, trusting that its results had been profitable, as indeed he now avers and charges them to have been, to all concerned; that the books of the said partnership were kept by *Henry White* of the city of *Baltimore*, who acted as the agent of the said firms, and so continued to act through all the changes hereinafter mentioned in the persons interested therein, both in buying and selling, and also in providing from time to time any additional funds that might be necessary for the continuance of its operations. That during all that time, your orator had never examined the books, or become aware from his own personal knowledge, of the profits of the business in which he had been engaged, although he had good reason to believe, and does now believe and charge, on the representations made to him, as well by the said *Henry* as by the said *John White*, who assumed to act, and did act for all the partners, and well knew of and directed all the operations of the said firm; and from the general nature of the business, which was conducted with skill, diligence and economy by your orator, that large profits had been made and the capital largely increased; that about the year 1825 or 1826, the said *John White* withdrew from the said firm, but on what terms and after what settlement with the other partners your orator does not know, and never has been informed—certainly without any settlement or consultation with your orator; that the said partnership and business were continued under the same name and style as before by the other partners, and your orator, the said *John* acting as the adviser of all the partners, and exercising the same control as when interested in their operations; that



on the said 7th March, 1835, the said *Robert White* having also withdrawn from the said partnership, after what settlement, if any, or on what conditions your orator does not know. Your orator, the said *John Campbell White* and *Campbell P. White*, agreed to carry on the said partnership and business in the city of *Baltimore* under the name and style of *John C. White & Sons*, and in the city of *New York* under the name and style of *Campbell P. White*, whereupon articles were prepared solely and exclusively for the purpose, as your orator was informed and believed, of settling the terms and conditions on which their future operations were to be conducted, which on being presented to your orator, with the assurance that such were their object and import, he signed without reading, and without having ever examined the books and accounts of the said partnership, or his private account, or any balance sheet, and without being aware of the state of the accounts of either of the partners, or of those who had retired as aforesaid from the firm; that the said partnership continued under the said articles, to be conducted as before, until the 18th May, 1843, when it was dissolved by your orator, no business having been done at the distillery for some months before, and especially since the August preceding, when your orator discovered that his partner, *Campbell P. White*, who had no personal knowledge of the concerns of the firm, and resided in the city of *New York*, had signed the name of *John C. White & Sons* to a note in favor of the said *Henry White*, for the sum of \$38,595 24, without consultation with or the knowledge of your orator; that during the whole time that the said *Henry White* acted as the agent of the firm, and up to the time when the said pretended indebtedness occurred, your orator had been as above mentioned the active partner, and as such alone authorized, and the only one of the partners who signed the name of the last mentioned firm, all of which was well known to the said *Henry* and the said *Campbell P. White*; that although the said *Henry* lived in the same city with your orator and the other partner, *John Campbell White*, and was in the habit of daily and friendly intercourse with them, he had never asked either your orator,

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or the said *John Campbell White*, for a settlement, or in any way intimated that any such indebtedness existed, or was pretended to exist, but on the contrary, your orator had been a short time before informed by the said *John White*, who was well acquainted with the books and business of the firm, and who, if he did not obtain his information from the books, received it directly from the said *Henry*, that the firm owed no money: and when your orator called upon the said *Campbell P. White* in relation thereto, he acknowledged, as your orator well knew and now charges to be true, that he had signed the said note without having made any examination of the said books. And your orator verily believes and therefore charges, that no such indebtedness did in fact exist, and that the whole proceeding was the result of a confederacy between the said *Campbell P.*, *Henry*, and the said *John White*, who assumed to act as the attorney of the said *Campbell*, and to control all the other partners as aforesaid, to defraud your orator; that about the month of March, 1842, and while the business of the said firm was prosperous and profitable, and your orator had good reason to believe, that all concerned were satisfied with its results, he was surprised and astounded by the refusal of the agent, the said *Henry*, to furnish the necessary funds out of the proceeds of the said business, for the payment of the hands, and by his detention of the grain then in his custody; which proceeding your orator believes was at the instance and by the advice of the said *John White* and the other confederates, and was designed to operate, and did operate to the injury of your orator; that for the purpose of further injuring your orator and ruining his credit, the said *John White* gave out, that your orator was largely indebted to the said firm, that is to say, in the sum of about \$15,000; that your orator becoming alarmed by the course thus pursued, and finding it necessary to attend to his own interest and guard his own rights more carefully than he had done before, demanded of the said *Henry* and the other partners, an examination of the books of the said partnership, and of the said *Henry*, and a settlement of the said business and firm, which request was, to his surprise, positively refused;

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that at the time the said demand was made by your orator, the said *John White* assuming, though in the presence of the said *John Campbell White* and *Henry White*, to act for them and all the others, said that no person should ever see the said books, although your orator, in the spirit of conciliation and with an earnest wish to avoid all controversy, and bring his own affairs to a speedy settlement, offered to refer them to any three persons that he and his confederates, and the other partners might select; that in the spirit with which the said refusal was made, the books have been withheld to this time, and the said partners and confederates well knowing, that on a correct accounting a large sum of money would be due to your orator, have ever since refused, and still refuse to come to a settlement, so that your orator has been kept to this day in complete ignorance of the extent of his rights, while the said *John White* and the said partners have at various times given out and charged that he was indebted to them and the said firm in about the sum of \$25,000, which allegation he avers to be unfounded; that the said *John Campbell White*, who is your orator's father, has never taken any active part in the said business, and knows nothing thereof, except as he hears it from the said *Henry, Campbell P.* and *John White*, who, your orator charges have combined and confederated together, as well for the purpose of injuring your orator as the said *John C. White*, in the premises; that the said *John C. White* is old and infirm, and entirely incapable of attending to business, and by the fear of the said confederates, and by their undue and improper practices, directed at their will and pleasure, so as to be used to your orator's and his own injury, though your orator well knows that weak and decrepid as he is, he would neither injure him or any other person, if allowed, and capable of learning the true state of the facts connected with the said partnership, and all the proceedings of the said confederates. Your orator knows not what interest the said *John White* may now have, if any, in the affairs of the said partnership, other than as the attorney of the said *Campbell P. White*, but he charges that it has been by his advice, assistance and connivance, that your

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orator's reasonable requests for the books, or an examination thereof, have been refused, and all his endeavors for a speedy and amicable adjustment of the affairs of said partnership utterly frustrated; who, for that purpose, has combined and confederated with the said *Campbell P.* and *Henry White*, although your orator has, as he charges, made various efforts for the purpose of adjusting all disputes on the most equitable terms and in the most speedy and economical manner.

But so far have your orator's advances from being properly met, that when he demanded the said books from the year 1814 to the close of the partnership, your orator was informed that he had already confirmed all the accounts, charges and books up to the year 1835, so as to preclude himself from making any examination prior to that time, or correcting any false or erroneous entries or charges that might have been made or committed by the partners, or their agent, or by the said *John White*, or by the said agent, at his suggestion, and under his direction; whereas your orator avers, that he never designed to enter into any such agreement, as he had never examined the said books and accounts; and if any such agreement or stipulation was included in the articles he signed, it was fraudulently inserted, with a view of deceiving your orator, and putting him at the mercy of the said confederates. What were the contents of the said agreement, your orator does not know, as he has never seen it since its execution, but only what purports to be a copy, in the handwriting of the said *Henry White*; the said paper having ever since continued in the possession of one or other of the said confederates; that the said books do not, in many particulars, exhibit a correct account of the said partnership; and especially in this, that he has never been credited, as he ought to have been, with the sum of \$3,000—the value of certain property adjoining the distillery, which in the year 1835, he conveyed to the said firm for its accommodation, and to enlarge the sphere of its operations; that soon after the said *Henry* obtained the note of the firm as above mentioned, he instituted proceedings at law for the recovery thereof; and having by the means and instrumentality



of his confederates, obtained the consent of the said *John Campbell White* thereto, a judgment was entered thereon. That the said *Henry*, having on hand a large amount of spirits belonging to the firm, applied the same in part satisfaction of the said judgment, without the consent of your orator, and finally demanded a mortgage of all the partnership property to secure the residue. That after practising on the fears of the said *John Campbell White*, the said confederates procured his assent thereto; and your orator to free his father from any further annoyance, but with a solemn protest against the whole proceeding, and against the justice of the said claim, joined in its execution; that the said confederates in further pursuance of their plans to injure your orator, and deprive him of his reasonable and just portion of the funds and property of the said partnership, procured a bill to be filed in your Honorable court by the said *John Campbell White*, for the appointment of a receiver, and the settlement of the affairs of the said firm: but that although your orator's answer was filed as far back as the 16th October last, and within three months after the filing of the said bill, no steps have been taken to obtain the voluntary answer of the said *Campbell P. White*, or to obtain an order of publication against him, so that the said cause may be brought to issue, and the matters of the controversy between your orator and the other parties, examined, adjusted and settled, according to the principles of equity and good conscience. In the meanwhile, the said partners have procured a lease of the property of the firm, at a rate no more than sufficient to pay off the annual incumbrances thereon, and thus succeeded in accomplishing their purpose of obtaining possession of all the property, as they had previously had of the funds of the said partnership, and are now willing, as their proceedings show, that the said cause shall forever remain in its present position. But your orator, on the contrary, whose funds have been thus withheld from him, by the fraudulent contrivances of the said confederates, is deeply interested in closing all controversies by a full, fair and complete examination of all his acts and doings, in and about the said business, so that he may, at an

early day, obtain what is justly due to him, and pay over to his co-partners, as he now offers himself ready to do whatever, on a just accounting, may be found due from him; that by reason of the partnership property being kept out of the market, when it ought to be sold, he is suffering grievous loss and injury, and the other partners and confederates are obtaining all the advantage thereof, and of the labor, diligence and skill of your orator given to the said business for nearly thirty years, all which doings, &c.

*Prayer*, that the said *John C. Campbell P.*, *John* and *Robert White*, (the said *Campbell P. White*, and the said *Robert White* being non-residents) account with your orator of and concerning the said partnerships, from the time your orator became a member thereof to their dissolution; and for that purpose, that they may be compelled to produce all the books of the said partnerships; that the said *Henry White* may also account with your orator of and concerning his agency, from the same period to the present time; that the said judgment and mortgage may stand security for no other or greater sum than on such accounting may be found justly and fairly due; and if nothing is due, may be set aside, vacated, and annulled; and that all the partnership property may be sold forthwith, and the proceeds applied as may be most equitable. And for further relief, &c., &c.

On the 30th September, 1844, an order of publication was obtained against the non-resident defendants, *Campbell P.* and *Robert White*, which was duly published. The other defendants were summoned and appeared.

At December term, 1844, attachments to answer were issued against the resident defendants. At March term, 1845, the attachments were returned, attached.

The defendant, *J. C. White*, demurred to the bill, because it was for several and distinct matters and causes which have no relation to, and are independent of each other; and wherein and in part whereof, this defendant is in no wise interested or concerned, and ought not to be implicated. For which, &c.

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The defendant, *John White*, demurred separately on the same grounds, as also *Henry White*.

Upon petition of the complainant, the Chancellor (BLAND) ordered the demurrers to stand for hearing on the 8th July, 1845, provided, &c.

At July term, (16th July,) the Chancellor overruled the demurrers, ordered each of the demurring defendants to be taxed with the costs of the demurrer, including a solicitor's fee, and the sum of five pounds current money. And that they respectively be in contempt until the costs, &c. be paid; and that the cause stand over with leave to the said defendants to answer or plead to the said bill, on or before the 1st day of September next, 1845.

At September term, 1845, the Chancellor (BLAND) passed the following decree:

This cause having been set down for hearing on the demurrers of *John C. White*, *John White*, and *Henry White*, and the said demurrers having been overruled by the order of the 16th July last, and the case having been thereby ordered to stand over, with leave to the said parties to answer or plead to the complainant's bill, on or before the first of September following; and the said parties having failed to answer or plead as allowed by the said order, and the order of publication heretofore passed in this cause having been duly published, and the said absent defendants having failed to appear and answer the bill of the complainant; it is thereupon, this 9th October, 1845, by, &c., adjudged, ordered and decreed, that the said bill of complaint be, and the same is hereby taken, *pro confesso*, against the said defendants.

And it is further adjudged, ordered and decreed, that the said parties account with each other, of and concerning the matters in the proceedings mentioned; and that the net proceeds of sale stand security for the mortgage and judgment claim of the said *Henry White* to such an extent only, as on accounting may appear justly due to him; and that this cause be referred to the auditor, with directions to take an account of and concerning the said matters from the pleadings, and proofs, &c.

And it is further adjudged, ordered and decreed, that the real and personal partnership property in the proceedings mentioned be sold; that *Henry Hardisty, Jun'r*, of the city of *Baltimore*, be, and he is hereby appointed trustee to make such sale, and that the course and manner of his proceedings shall be as follows: He shall first, &c.

The resident defendants on the 27th September, 1845, petitioned for further time, and until about the 6th November, to answer the bill, on the ground of their solicitor being necessarily absent from the State ever since the overruling of the demurrer. This was objected to by the complainant, and therefore overruled by the Chancellor on the 1st October, 1845.

On the 20th October, the defendants *John* and *Henry White* renewed their petition for leave to answer the bill, enlarged the grounds on which their prayer was founded, and tendered answers with it. And at the same time, *C. P. White* preferred a similar petition as to the decree, *pro confesso*, against him, and also tendered his answers to the original bill.

On the 22d October, these petitions were severally dismissed with costs.

The said defendants then appealed from the decree of the 9th October, and the order of the 22nd October.

On the 28th November, 1845, *John C. White* preferred his petition, accompanied with an answer, for leave to file his answer, and rescind the decree against him, which was also dismissed, when he also appealed from the decree and order.

Similar proceedings were also had on the part of *Robert White*.

By agreement, these appeals were all tried upon the same transcript from the Court of Chancery.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER, and MARTIN, J.

By J. M. CAMPBELL and T. S. ALEXANDER, for the appellants, who insisted:

1st. That the bill is multifarious in blending the matters of



account of *Henry White's* agency with those of the partnership generally, with which *Henry White* had no connection, and in which he has no interest; and in blending the accounts of the partnership anterior to the year 1819, in which *John White* was interested, with those of the partnership subsequent to that date, in which he had no interest; and in blending the accounts of the partnership anterior to 1835, in which *Robert White* had an interest, with those subsequent to that date, in which he had no interest. *Sto. Eq. Pl.* 271, 530. 1 *Dan. C. Prac.* 437. 3 *Lib. Law & Eq.* 259, 263. *Campbell vs. Mackay*, 13 *Eng. Con. Ch. Rep.* 550. *Saxton vs. Davis*, 18 *Vesey, Jr.* 72. *Gaines et ux. vs. Chew*, 2 *Howard*, 643. *Harrison vs. Hogg*, 2 *Ves. J.* 323. *Stuart vs. Coalter*, 4 *Randolph*, 85.

2d. That the bill ought not to have been taken *pro confesso* against *John C. White*, *John White*, and *Henry White*, on their failure to answer within the time limited by the order of the 16th July, 1845; but the complainant ought to have resorted to the usual processes of attachment, &c. to compel answers. *Gas Light Co. vs Peale*, *Ms. Dec.* 1826. *Buckingham vs. Peddicord*, 2 *Bland*, 447. *Winter vs. Tiernan*, *Ms. Dec.* 1836. *Dan. C. P.* 391, 661. 1799, ch. 79, sec. 2. *Birch vs. Scott*, 1 *Bland*, 114.

3d. That it is competent for the court to set aside a decree regularly entered, for the purpose of admitting an answer disclosing merits, where the application is made within a reasonable time after the decree. It will be insisted that the petitions of the above named defendants excuse their defaults; and that the answers tendered disclose merits which are proper to be admitted. *Beames' Orders*, 249, 1676. 2 *P. Wms.* 481. *Hill vs. Turner*, 2 *Ves. & Bea.* 372. 2 *Bland*, 447, 450, 458. 1785, sec. 19. *Kemp vs. Squire*, 1 *Ves. Sr.* 205. *Benson vs. Vernon*, 4 *Bro. Par. Cas.* 546. *Williams vs. Thompson*, 2 *Bro. C. C.* 279. *Wooster vs. Woodhull*, 1 *John. C. R.* 539. *Birch et al. vs. Scott*, 1 *G. & J.* 393. *Oliver vs. Palmer & Hamilton*, 11 *G. & J.* 147. *Pinkney vs. Jay & Mason*, 12 *G. & J.* 83. *White vs. White*, 7 *G. & J.* 209.

4th. That the non-resident defendants, *Campbell P. White* and

*Robert White*, were entitled *ex debito justitiæ* to file their answers at the time they were tendered; and were it otherwise, they have sufficiently excused their defaults.

5th. That the decree is erroneous in directing the partnership property to be sold clear, and discharged of the mortgage of *Henry White*, and especially on credits. As mortgagee, he had a right to retain his security until he should be redeemed fully; and to insist that the sum really due on his security should be ascertained before any decree whatever should be entered against him.

6th. That the decree is erroneous also in this, that it does not distinctly ascertain and declare the extent of the liabilities of the several parties; but leaves such liability to be collected by inference from the averments in the bill itself.

7th. The appellants will further insist, that if the decree should be reversed on the first point, the bill ought to be dismissed absolutely; that upon the practice of this court, the same consequence should flow from a reversal on the second ground: that it is competent for the court on reversing a decree for any ground, in its discretion, to pass such decree as the court below ought to have passed, or to remand the cause to the court below for further proceedings, on such principles as equity may dictate; and that if the decree in this case should be reversed, the purpose of justice will be advanced by remanding this cause to the Court of Chancery, with authority to admit the answers of the defendants. *Gibbs vs. Claggett et al.* 2 G. & J. 27.

8th. There must be one month's time between the last publication of the order against a non-resident, and the time of taking a bill *pro confesso*.

By McLEAN for the appellee.

The appellee in this case will contend first—that no appeal could properly be taken, or ought to be allowed from the decree below, or any of the orders subsequent thereto, because,—

1st. The proceedings shew that the decree is only for a settlement and winding up of a partnership, which the demurrers

had admitted to exist, and upon the accounting thereby, directed it may be that the final decree would be against the complainant, in which event, there would be nothing to appeal from.

2d. The answers accompanying the several petitions, shew the decree to be correct in every necessary particular; the dispute about the true state of accounts not being thereby settled at all, and its object being to obtain by an account, the means of settling what was so disputed, in order to a final decree, in which the rights of the partners might be adjusted completely and definitively.

3d. The decree, for the sale of partnership property, does not in any way partake of the character of a final decree. A sale in partnership cases being usually ordered without waiting for a final hearing; a decree for that purpose is in no manner final. 1841, *ch.* 11.

4th. No appeal will lie from the orders refusing to receive the answers of the non-resident or resident defendants. 1830, *ch.* 185. 1 *Swan*, 506.

5th. If the decree appealed from is final, then the non-resident defendants ought not to have been allowed to file their answers; and if it was not final, then the other defendants have no right of appeal.

And the appellee will further contend, that if the appeal should be allowed, the decree of the court below, and the several orders, ought to be affirmed, because,—

6th. The bill is not multifarious, includes no unnecessary parties or interests, and seeks relief against no party whatever, whom it does not show to be interested in the account and decree asked for. 1 *Dan. Prac.* 392. *Dimmock vs. Bixby*, 20 *Pick*, 377. *Skepp vs. Harwood*, 2 *Swan*, 622. *Att'y Gen. vs. Young*, 3 *Vesey*, 209.

7th. The decree, *pro confesso*, was, according to the equity and true intent and meaning of the acts of Assembly in this State, for saving delays in the Court of Chancery, in proceedings against obstinate and negligent defendants, and according to the practice of that court, the remedy to which the complainant was entitled. *Leavitt vs. Cruger*, 1 *Paige*, 422.

*Denison vs. Bassford*, 7 Paige, 372. *New York Chem. Co. vs. Flowers et ux.* 6 Paige, 654. *Trust & Fire Ins. Co. vs. Jenkins*, 8 Paige, 593, 594. *Wood vs. Strickland*, 2 Ves. & Bea. 157. *Nabob of Arcott vs. The East I. Co.* 3 Bro. C. C. 292. *Griffith vs. Wood*, 1 Ves. & Bea. 540. *Alex. Md. Prac.* 59.

8th. The petitions of the defendants do not in any manner excuse their default, and the answers accompanying the same, shew no defence that they could not have had the benefit of, before the auditor, or at the final hearing after the account; and especially no defence against the said decree for an account and sale of partnership property.

9th. The proceedings, as they now appear before the court, show, that a sale and a decree for an account are the true and proper remedies; and if the parties appellant are entitled to a reversal at all, it will only be for the purpose of allowing their answer to avail before the auditor, and at the final hearing, as if put in before the decree of the 9th day of October, 1845.

10th. The appellants are not entitled to a reversal as mentioned in the fourth point, because they were all in default; and although there may be more inconvenience in making their defence before the auditor, they will not be precluded therefrom, and the court will not reverse merely for the convenience of a defendant who is in default. *Geary vs. Sheridan*, 8 Ves. J. 192. *Knight vs. Young*, 2 Ves. & Bea. 182.

11th. All the matters stated in the answers, appended to the several petitions, and offered to be filed as such, might be properly used as evidence before the auditor, whether an order to that effect had been passed or not: so that there was no need of opening the decree, as justice did not require it on the showing of the answers; and no need for an order to allow them to be used before the auditor, as the facts might be there shown without any order to that effect.

12th. If one month from time of passing the order of publication has elapsed, and the order be published once a week for three successive weeks, the decree *pro confesso* may pass at the end of the month.



By MEREDITH for the appellee.

I propose to argue a single proposition. The objects of the bill is to settle partnership transactions from 1814 to 1843, and for an account. The defendants are guilty of great delay, and only purposed to answer after their demurrers were overruled. There were three separate demurrers. Two defendants, *Robert* and *Campbell* did not demur. Two of the defendants who demurred had no cause of demurrer. They were partners from 1814 to 1843, and always interested in the objects and subjects of the bill. Is multifariousness in regard to one defendant applicable to all? It is not so. *Campbells vs. Mackay*, 1 *Myln. & Craig*, 602, 603. *Saxton vs. Davis*, 18 *Ves.* 72.

The case in 2 *G. & J.* 14, does not touch this point. There it extended to all the defendants. The rule stands to prevent, as far as practicable, a multiplicity of suits. Chancery demands the presence of all parties in any way connected with the cause. Courts incline against multifariousness. It is only noticed when essential to the justice of a cause. *Ward vs. Duke of Northumberland*, 2 *Anstreth*, 469.

*Harrison vs. Hogg*, 2 *Ves.* 323. 1 *Sim. & Stua.* 561, are cases of misjoinder.

The claims here are not of a different character; they all relate to the same subject matter.

Where the claim is single, all interested must be parties though they differ in degree. 6 *Jno. C. R.* 157. A bill against several persons must relate to the same subject. Chancellor Kent lays down the true rule. *Salvidge et al. vs. Hydge et al.* 5 *Maddox*, 138, 145. 3 *Lib. Law & Eq.* 260. *Dan. Prac.* 439. *Jacob C. R.* 151. *Campbell vs. Mackay*, 1 *Myln. & Craig*, 620. 2 *How.* 169, adopts the opinion of *Sir John Leach*. *Fellows vs. Fellows*, 4 *Cowen*, 698. *Coop. Eq.* 310.

*John White* was a necessary party. There was no settlement with him at the time of his withdrawal. The statement of this is not positive, but explicit enough. There was no settlement with the knowledge of *Joseph*. This is reasonably certain. *Sto. Plea. in Eq.* 355, *No.* 1.

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*John White* has a common interest, centering in the partnership accounts. In their final adjustment, they are necessarily and intimately connected. They resemble two estates connected together. *Lewis vs. Edmond*, 6 *Simon*, 251. *Whaley vs. Dawson*, 2 *Sch. & Lef.* 370. 1 *Atk.* 282.

*Henry White* was a necessary party on the ground of fraud, and to vacate a judgment lien on the partnership effects.

By REVERDY JOHNSON for the appellants, in reply.

What is the test rule as to multifariousness? Chancery will avoid multiplicity of actions: but will not decide in one bill on cases which involve different principles of law, distinct grounds, and require the application of different rules of evidence between the parties.

From 1814 to 1825, *John White* was never called on to account. *Henry* was never a partner. He was merely an agent, to buy and to sell, either a debtor or a creditor of the firms. Has nothing to do with the state of accounts between the partners—not concerned in their settlements. This bill cannot be amended. What part of the case, and which of the defendants, can the complainant amend, or retain? There is no alternative but to dismiss the bill.

The defendants asked for an enlargement of time to answer during September, 1845; the term at which the decree was passed. This was refused. The court will take judicial notice of the beginning and end of the terms of court. The September term commenced on the fourth Tuesday of September, and terminated on the first Tuesday of the following November. The decree passed on the 9th October. On the 20th October, at the same term, the *first* application was made to enlarge the time to answer. This was refused.

An order to take a bill *pro confesso*, is not to be confounded with a decree *pro confesso*. An order is for the purpose of notice. The order of July, 1845, gave the defendants time to answer until 1st day of September, 1845. Under it the defendants might plead or answer *de novo*.

A decree *pro confesso*, is final. Now look at the order in

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this cause. It is upon the overruling the demurrer that the cause stand over with leave to answer on or before 1st September; and this was followed by a decree without any notice to the failing party—no notice of intent to ask for it or afford any opportunity to make an excuse. Now, I maintain, that all the process of contempt, according to our acts of Assembly, should have been resorted to and run out, before the bill was taken as confessed. *Bland*, 451.

Upon the cases cited by the opening counsel, the time for decree had not arrived in this case. The decree is not justified either by the *English* practice, or our legislation. *Dun. Prac.* 95.

The demurrer being overruled, the complainant is bound to proceed as if it had not been filed. It is like an insufficient answer, which is no answer.

As to *Robert White*, a non-resident, there must be a non-suit. The court had no jurisdiction to decree against him. In this case, to call him to an account, there must be jurisdiction over his person. There is no other ground of jurisdiction asserted in the bill.

All the partnership property of 1835 went into the new concern, in which *Robert* was not interested—no property in *Maryland* to affect him—no interest in it. Jurisdiction as to *Robert* fails both as to person and property. He is protected by the Constitution of the *United States*. He could not be sued in *New York*, upon the decree here in *Maryland*. As to him, the decree is a nullity. He proposes by his answer tendered and refused to show he is released, has a meritorious defence. His answer would have protected all the other defendants; and he should have been permitted to appear and defend. Moreover, he may appear under the act of 1795, ch. 88, within eighteen months of date of decree, and file a bill of review. *Pinkney vs. Jay & Mason*, 12 G. & J. 69.

The defences were not opened before the auditor; after decree, *pro confesso*, he is bound to account. 2 *J. C. Rep.* 629. 1 *Jacob*, 49. 3 *Myln. & Craig*, 191. *Oliver vs. Palmer & Hamilton*, 11 G. & J. 426.

Under act of 1842, a month's notice, by publication, must be given to defendant to come in—a month must elapse. Here only three weeks notice given.

As to all these defendants, their answers should have been received. The refusal of the Chancellor to receive them was error. *Birch vs. Scott*, 1 G. & J. 393, 426. 2 Bro. C. R. 279. 12 G. & J. 83. *Oliver vs. Palmer & Hamilton*, 11 G. & J. 137, 147.

A decree under the act of 1820, in respect to this error, is not distinguishable from other decrees.

Was the decree appealed from a discreet act? The facts are all one way. The decree does not depend on the consent of the opposing counsel. To pass such a decree is a matter of legal discretion. Consent in such case may be controlled by the Chancellor. He may decide against it. The answers of some of the defendants, and petitions filed within ten days of decree, and from the nature of the answers, the facts of the bill must be erroneously charged.

The acts of 1785, ch. 72, sec. 30; 1795, ch. 88, sec. 1; 1799, ch. 79, sec. 1, show that the Chancellor had a discretion in this cause: might have issued a commission for proof.

MAGRUDER, J., delivered the opinion of this court.

The very many points, which it is supposed arise on this appeal, have been argued by the counsel with great ability. If, however, one of the objections urged by the appellant to the relief which is sought, be well founded, it will be unnecessary for us to intimate an opinion on other questions.

To the bill of complaint which was filed in the Court of Chancery by the appellee, some of the appellants demurred upon the ground that it is multifarious; and this court has said, (2 G. & J. 29) if the bill be liable to be dismissed for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief.

We at once then come to the examination of this question, and in deciding it, our attention is to be confined to the bill



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itself, the demurrer admitting every thing therein to be true, which is properly introduced into it.

One and the leading object of this bill is to obtain a settlement of certain partnership concerns spoken of in it. What then do we learn from the complainant himself of them, and his connection with them?

In 1814, there existed (how long it had been in existence we are not told) a partnership, consisting of the defendants, *John C. White, Robert White, John White, and Campbell P. White*. In the course of that year the complainant became a partner, and associated with the defendants just named, in the same business, and in the same places—*New York* and *Baltimore*.

The enquiry here presents itself, did the complainant thereby become a member of the previously existing firm, or of one just formed? *Story*, in his commentary on the law of partnerships, 438, sec. 307, says, "every partnership being founded in the voluntary consent of all the parties thereto, and that consent being founded on a *delectus personarum*, no partner has any right whatsoever to introduce a new partner into the firm, without the consent of all the other partners; and if such consent be given, then it becomes to all intents and purposes, the substitution of a new partnership for the old one, and this is equally the doctrine of our law, and of the *Roman* law, and of the modern foreign law." Of course, the complainant, until he was admitted into the concern in 1814, was no partner, and was not at all responsible for the debts of any previous partnership. The partnership thenceforth, and until it was dissolved, consisted of five, to wit, the four partners just named, and the complainant; so long as that partnership existed, each was entitled to an account of its concerns, its profits, its effects, and its liabilities. How long did the partnership formed in 1814 continue? No change took place until the year 1825 or 1826, when one of the defendants (*John White*) withdrew; and what was the effect of that withdrawal? The complainant in his bill tells us, that in 1825 or 1826, the defendant, *John White*, withdrew, whether with or without just cause—with or against the consent of the other partners, he does not

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explicitly state—but he charges that subsequently to his withdrawal, the business was carried on by a firm consisting of the other partners and himself. *John*, it is admitted, did withdraw, his right to withdraw is not questioned, and it would be difficult to maintain that a member of a partnership cannot withdraw from it, without a dissolution of it. A dissolution of a partnership may be brought about in various ways, and among others, “by a withdrawal of a partner from the business of the partnership.” The business was afterwards carried on by the other partners: of course, *John* was excluded from all participation in it. So things continued until March, 1835, when *Robert* withdrew, and thenceforth it was carried on by *John C.*, *Campbell P.* and the complainant, until 1843, when, as he himself informs us, the complainant retired from the partnership, and his retirement from it, he charges dissolved it.

Now no one can doubt, that either of these parties could demand a settlement of the partnership concerns during the whole time that he was a partner, provided, he demand that settlement from those, who, during the time were his co-partners. The defendant, *John White*, was entitled to demand a settlement, as well of the partnership which had existed before, as of that which was formed in 1814, but must take care to demand it of the proper persons. The complainant was a proper person to be made a party to the settlement of the concerns of the partnership formed in 1814, and which continued until 1825 or 1826. He was not a proper person to be made a party, and might have demurred to a bill, asking a settlement of the accounts of the firm, which was dissolved in 1814, because, says *Mitford*, “it would put him to the trouble and expense of a litigated question, with which he has nothing to do;” yet it would be very difficult to prove that he had not as much to do with the partnership which existed before he associated himself with its members, as the defendant, *John*, had with a partnership carried on by men who had been indeed, but had ceased to be, connected with him in business.

Some of the cases which have been cited, and as illustrative of the doctrine of multifariousness, are rather exceptions to

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the general rule, which forbids multifariousness in a bill. Mention of those exceptions will be found in *Story on Equity Pleading*, 285th, and following sections. It is true that there are such exceptions, as there are to the rule which requires all persons interested to be made parties to a bill in Chancery. It can scarcely be pretended that this case can be brought within any of the exceptions.

The defendant, *John White*, may with great truth affirm, that this bill is to burthen him with expenses which he is not bound to incur, to swell the pleadings with the state of the several claims with which he cannot be considered to have any sort of connection, and by uniting in one suit a partnership, of which he was a member, with partnerships in which he had no interest, would delay the settlement of his own accounts. These, we are told by all the writers who treat of the subject, are valid objections. *Cooper*, in his *Equity Pleadings*, 183, states one other reason why multifariousness is discountenanced in equity. "It is also to prevent confusion, and to preserve some analogy to the comprehensive simplicity of declarations at common law, that this ground of demurrer has obtained." Is any thing like this tolerated in common law courts?

If the case before us had already been fully stated, there is abundant reason for saying that in the multifariousness of this bill, ample ground for the demurrer, which has been filed by the defendant, *John White*, may be found, seeking to enforce different demands against persons liable respectively, but not as connected with each other. "Even this (says *Lord Eldon*, in *Saxton vs. Davis*, 18 Ves. 72) is clearly multifarious."

A very large portion of the objectionable matter which the bill contains is yet to be noticed.

*Henry White* is also made a defendant, and is required to answer all the matters charged in the bill, although it is expressly stated that he was no partner, but only an agent during the several partnerships. He is required also to give an account of his agency. Why shall he not exempt himself from the expense of answering *in extenso*, all the matters which the bill requires all the defendants to answer?

It is true that he is said to have been the financier and agent for many purposes of those various firms. Because of this, he may be a very important witness in the case. But why make him a defendant, when of his answer no possible use can be made by any of the other defendants?

It would seem that for his services as agent, he was to receive a salary, as all the persons in their service it may well be supposed were. It appears further, that he had made some efforts to secure the balance claimed by him to be due to him, and had obtained some security for it, without the consent or knowledge of the complainant, though it is admitted that he, the complainant, with the other partners, executed the mortgage, which is that security. It is not necessary here to enquire whether, as the other partners seem to have been able to settle with their agents, and to give him satisfactory security for the eventual payment of the balance admitted by them to be due to him, there was a contract between the parties, which was violated by such an adjustment as was made of the claim of *Henry*. It is also unnecessary for us in disposing of this defence, to say that the judgment or mortgage given to the defendant, *Henry*, could be set aside, if impeached in a proper way. If the judgment or mortgage is to be impeached, such a case is not to be blended with this suit with the partners about the partnership concerns, all the other parties to which have the same interest that the complainant has in reducing or defeating his claim; and if thus blended, the connection of them might greatly delay the settlement of both, and have the effect of extending the credit which the defendant, *Henry*, agreed to give to his debtors.

No doubt it ought to be the wish of courts to prevent a multiplicity of suits, and to lessen, as much as possible, the expense of litigation. This, however, is not to be accomplished by a denial to any man of his just rights; and if *Henry White* is to be compelled to blend his claim with any controversy between the several members of these several partnerships, and to await the end of this controversy, over which he has no control, he may not only be loaded with



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enormous costs, which he is not bound to incur, but subjected to a delay, which is often more injurious than a prompt denial of justice. This must be pronounced to be “confounding distinct matters: this is a blending of several matters perfectly distinct and unconnected: this is to demand several matters of distinct natures, against several defendants.” Surely the claims united in this bill are of “so different a character, that the court will not permit them to be liquidated in one record; a record with a large portion of which, and of the case made by which, he (the defendant, *Henry*) has no connection whatever.” Surely, the defendant, *Henry*, has a right to insist, that even if the judgment and mortgage may be impeached, and his claim contested; yet this “is a perfectly distinct case” from that between the other parties to this bill, and he “has a right to have that case discussed and decided by itself, without being mixed up in a suit,” for a settlement of all the partnership concerns.

The bill asks, among other things, a settlement of the concerns of three distinct partnerships, to compel the agent of these several partnerships to come to a settlement with each of them; to set aside the settlement which it is charged that the agent has made with some of the partners. It also asks a decree, declaring that the judgment and mortgage shall stand as a security, for such sum only as it shall be ascertained is due to the agent, and to direct a sale forthwith of the mortgaged premises. This certainly is “a demand of several matters of a distinct and independent nature, against several defendants in the same bill,” and in the language of *Justice Story*, (*Equity Pleading*, sec. 271) would be oppressive, because it would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection. Of this case also it may be said, “the proofs applicable to each are apt to be confounded with each other, and great delays would be occasioned by waiting for the proof, respecting one of the matters, when the others might be fully ripe for hearing. Such proceedings are not to be permitted

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in courts of equity, which, in cases of this sort are apt to preserve some analogy to the comparative simplicity of proceedings at common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees.” *Story’s Equity Pleading*, 3d edit., p. 296.

There are in this bill, charges, that some of the defendants confederated together for some purposes, and in 2d *Vernon*, 416, there is a case in which a demurrer for multifariousness was overruled, because the charge that the defendants had combined together was not expressly denied. The charges in this bill are not such, as it would seem the case in *Vernon* would require. But of the case in *Vernon*, *Cooper*, in his *Treatise on Equity Pleadings*, says, “is denied, and is contrary to the modern practice in settling demurrers.” Indeed, it cannot be the law of *England*, as it appears by some recent decisions there; that although multifariousness cannot be objected to by the defendant at the hearing, unless he has demurred, yet the court may take the objection at the hearing *sua sponte*. See cases, *Story*, p. 295, note. Indeed, we are told by *Lord Cottenham*, in *Campbell vs. Mackay*, (13 *Condensed Ch’y Reports*, 543) “the court in deciding cases of this description, seem to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule.”

The act of 1841, ch. 11, authorizes an appeal in this case, and the case being before us, all orders and decrees passed therein are to be reviewed.

DECREE REVERSED AND BILL DISMISSED.

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ASHTON ALEXANDER AND JOHN WILSON *vs.* THE MAYOR  
AND CITY COUNCIL OF BALTIMORE.—*December, 1847.*

The act of 1838, ch. 226, enacted that the *M. and C. C. of Baltimore* should have full power to provide for laying out, opening, extending, &c., in whole or in part, any street, &c. within the bounds of said city, which in their opinion the public welfare or convenience may require; to provide for ascertaining whether any, and what amount, in value of, *damage* will be caused thereby, and what amount of *benefit* will thereby accrue to the owner, &c. of any ground within or adjacent to said city, for which such owner &c. ought to be compensated, or ought to pay compensation, and to provide for assessing and levying either *generally* on the whole assessable property within the said city, or *pecially* on the property of persons benefited, the whole or any part of the amount of damages and expenses which might be incurred; to provide for granting appeals to *Baltimore City Court*, from decisions of any commissioners who might be appointed under the authority of the city, &c. securing a review of the assessment by a jury. *Held*, that this act was a constitutional exercise of legislative power, and all proceedings of the city in conformity to it valid.

The power of appropriating to a public use the property of individuals, when public necessity or utility requires it, upon securing to the party whose property is sacrificed, a just compensation for any injury he may sustain, resides in the State as a portion of its inherent sovereignty.

It is this supreme power over the property of individuals which enables the State to confer upon our subordinate jurisdictions, both municipal and judicial, the right to take private property, for the purpose of opening streets and roads, when in their opinion it is demanded by the public welfare and convenience, adequate provision being made for indemnification.

The ordinance of the city of *Baltimore*, of the 9th March, 1841, passed to carry into effect the powers granted by the act of 1838, ch. 226, directed the commissioners, after ascertaining the amount of damages and expenses to be incurred in any case, to assess the same on all the ground and improvements within the city, the owners of which, as such, the said commissioners should decide to be benefited by accomplishing the object authorized in the said ordinance—apportioning them in just proportion, according to the value of the benefit, which, in the estimation of the said commissioners, will accrue to each owner of any right or interest claimed in any such ground or improvements—does not subject the individuals embraced by it to an unequal and partial tax, for the prosecution of an improvement in which the whole community is interested.

No burden is imposed by such an ordinance on the person on whom it operates. It is a mere requisition that the owners of property, the value of which is enhanced by the opening of the street, shall pay for the improvement in a ratio to the benefit derived from it.

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Extravagant estimates of benefits in such cases may be corrected upon appeal, and by a contest before a jury, which is secured to an aggrieved party. Assessments equivalent to benefits derived in such cases are equitable.

The ordinance in question exempted certain property, as not benefited, from the assessment to be made under it. If it had appeared in fact, that the property so exempted was benefited, then the ordinance would be void.

Chancery will not interpose, and arrest by injunction the progress of a public improvement in a municipal corporation, upon a mere inferential and argumentative statement with reference to an essential fact omitted in the bill, necessary to establish the complainants right to the writ.

Where an act of Assembly gave a power to a municipal corporation, to provide for opening a street, with a right of appeal, and to a trial by jury, by any party aggrieved, before an inferior tribunal, and the right of appeal was exercised, the Court of Chancery has no jurisdiction to supervise or re-examine the proceedings and judgment of the court, to which the appeal was taken.

#### APPEAL from the Court of Chancery.

The bill of the appellants, *Ashton Alexander* and *John Wilson*, filed on the 26th January, 1847, charged that by an act of the *General Assembly of Maryland*, passed at its December session, 1838, chapter 226, entitled “An act to vest certain powers in the corporation of the city of *Baltimore*, in relation to streets,” the *State of Maryland* purports and attempts to confer upon the *Mayor and City Council of Baltimore*, the full power and authority to provide for opening, laying out and extending, widening, straightening, or closing up, in whole, or in part, any street, square, lane or alley, within the bounds of said city, which, in their opinion, the public welfare or convenience may require; and bestows upon this municipal corporation, the unbounded privilege (heretofore regarded as one of the transcendant attributes of sovereignty) of taking private property and taxing, (and that even under a scheme of partial and arbitrary taxation) and for the taxes charged, selling real estate within the said city; that the said corporation, seeking to provide for the exercise of the powers thus proffered to it by the legislature, passed (on the 9th March, 1841) an ordinance, No. 10, entitled, “An ordinance to provide for exercising certain powers vested in the corporation,” in relation to streets in the city of *Baltimore*, authorizing



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the appointment of commissioners, to act in effecting the extending, and opening, and changing streets, lanes and alleys, as aforesaid, under said act of Assembly, and the taking of property, and the taxation, (upon the partial basis as aforesaid) and the enforcement of taxation aforesaid, to which ordinance your orators refer; that under said ordinance, there were appointed commissioners, who are and have been acting as such, to wit: *Anthony Miltenberger, John Dushane and John F. Hoss*; that by an ordinance of said corporation, passed the 15th April, 1835, entitled "An ordinance providing for the extension of *Fayette* street, the said corporation required that *Fayette* street should be extended easterly from the east side of *Gay* street across *Jones' Falls*, and thence to go in a straight line until it should strike the line of the south side of *Pitt* street, so connecting and opening into one continued street, *Fayette* street and *Pitt* street, said ordinance, among other things, providing and enjoining, as your orators charge, that for said extension of *Fayette* street, and any expenses and damages therefor, any property on *Baltimore* street should *not* be assessed or charged, although, as your orators state, said *Baltimore* street is parallel with *Fayette* street, and next thereto, and within the possible, if not indeed the probable range of fair assessment, even upon the partial scheme of taxation prescribed by the said general ordinance, passed for carrying out the said act of Assembly; and said ordinance for extending *Fayette* street, also exempts the said corporation (constituted, as the incorporating act shows, of the inhabitants of the city of *Baltimore*) from any expense, cost or charge, in relation to, or connected with, said extension of *Fayette* street, except the building of a bridge over *Jones' Falls*; and as regards assessment on property held by said corporation, that the commissioners aforesaid proceeded in the office aforesaid, of extending and opening *Fayette* street, under color of the last mentioned ordinance, by ascertaining and assessing the value of the property, to be taken and appropriated for the said object, and the necessary expenditures, and assessing the amount and damages accordingly, *not as a debt and burden of the public and of the city at large*, but

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(in the terms and spirit of said general ordinance) upon particular individuals and corporations, judged (and conjecturally assumed, as your orators believe and charge) by said commissioners to be benefited by said work of extension and opening, in respect of pieces of ground owned by them on or near *Fayette* or *Pitt* street, among which parties so charged were certain religious congregations, whose taxation in that respect was of a large amount in all; that on an appeal from said assessment, and taxation of said commissioners, taken to *Baltimore* City Court, under the general ordinance aforesaid, the said religious congregations were absolved and declared exempt by said court from said assessment and taxation, and from all charge and taxation whatsoever, for or relative to said extension and opening; that thereupon, most unjustly and arbitrarily, and without reference to special benefits of any of the other parties charged, flowing from said extension and opening, the amount of the said taxation from which said religious congregations were relieved, was charged and apportioned (and most unequally too, apportioned) upon and among the remaining taxed parties aforesaid, of which number are your orators; the taxation in some instances being made double the amount assessed as aforesaid by said commissioners; that they were not parties to said appeal, and were unrepresented and undefended before said City Court, as was the case with many of said parties, thus subjected to the increased and aggravated taxation aforesaid; nor had your orators any notice whatsoever of any claim or design or pretension whatsoever, to augment as aforesaid the said taxation already imposed on them by said commissioners, and not brought into question by your orators, nor submitted to the action of said City Court by any appeal on their part; that the tax on your orator *Alexander's* property, which, by the assessment of the commissioners was \$368, is now, by the arbitrary increase aforesaid, \$436 49; and that your orator *Wilson's* said tax, from (as is believed) \$162, is increased to \$220 68; that sales were made for the benefit and uses of said extension and opening of certain property taken for said project, and to an amount exceeding *eighteen*

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*hundred dollars*, which amount your orators insist and charge should in the taxation reviewed and determined upon under said appeal, have been abated from the whole assessment, and been deducted rateably and distributively from the respective assessments of the parties charged; but your orators charge that no such abatement nor any allowance or consideration whatsoever, for or of said proceeds of sale, was made or had upon the final adjustment and determination aforesaid of the said taxation, in said City Court; that said entire assessment of said commissioners was thus in manner and arbitrarily as aforesaid, passed upon and finally determined by the verdict of a jury in the said City Court, on appeal aforesaid, and under the direction of the judges of said court. And thereby your orators are taxed and required to pay the amounts aforesaid, specified for and in respect of said extension and opening of *Fayette* street, and the said amounts are claimed from them respectively under the said oppressive and invalid act of Assembly, ordinances and proceedings of commissioners, and of jury and court; and the real estate of your orators respectively, in respect of which they are taxed as aforesaid, is liable to be sold and threatened to be sold to satisfy said unjust requirements; that said final assessment has been returned by the City Court aforesaid, to the *Register of the city of Baltimore*, and that the collector of taxes for said city, *Henry Snyder*, is accordingly now claiming payment of the several amounts of assessment aforesaid from your orators respectively, and in default of payment, the several pieces of ground, for which your orators are so taxed, are on the 11th February, 1847, to be advertised to be sold; and your orators are thus in jeopardy of their estate, from the operation of a law, ordinances, and proceedings, contrary to the acknowledged principles of constitutional law, and in defiance of all the safeguards of the citizen's property, and civil liberties; for your orators maintain that not only have the proceedings as now detailed by your orators under said ordinances, been most irregular and arbitrary, and the partial character of the said taxation been most oppressive, but that the said act of Assembly bestowing the supreme powers upon

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the said corporation is unconstitutional and invalid, as delegating to a subordinate agency, *an authority and discretion peculiar to the sovereign power*, and to abide with it, and to be exercised by that sovereignty directly and exclusively. But notwithstanding all these irregularities and oppressive procedures, and the utter invalidity of said act of Assembly, and the virtual usurpation of power, although colorably conferred by said act, asserted by said corporation, and to which your orators are about to be subjected, by the penalty of having their property sold, and themselves divested of their rightful estates, the claims aforesaid against your orators are persisted in, and your orators are in imminent hazard of the unjust and onerous exactions aforesaid, all which is against equity, and much to the grievance of your orators. In tender consideration whereof, and for and to the end that the said corporation, the *Mayor and City Council of Baltimore*, may answer the premises, and that said corporation be perpetually enjoined, and prohibited from selling the property aforesaid of your orators respectively, for and in regard to which, they severally are as aforesaid assessed and taxed, and from in any wise claiming, or proceeding to obtain payment of said assessments and taxes from your orators, and that your orators may respectively have such further and other relief in the premises, as may seem proper. Prayer for injunction, enjoining and prohibiting the selling, or offering to sell, any of the property aforesaid, of your orators respectively, for or on account of the assessment, taxation and charges aforesaid against your orators respectively, or any of their property, and from in any wise claiming or proceeding upon, or in relation to said assessments, taxations and charges, until this court's further order in the premises.

The Chancellor (JOHNSON) refused the injunction, stating he could not regard the act of Assembly as unconstitutional; and for the alleged improper conduct of the commissioners, redress might have been had by appeal.

On the 10th day of March, 1847, the solicitor of the complainants filed in the said cause an attested copy of the said



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bill, with the following opinion and order of the Honorable STEVENSON ARCHER, Chief Judge of the Court of Appeals.

Opinion of ARCHER, C. J. of *Maryland*.

I think it cannot be contended, at this day, that the act of Assembly of 1838, ch. 226, is unconstitutional.

The appropriation of private property to public use is undoubtedly a high sovereign power; but the practice of our State, from the formation of our government, has sanctioned the delegation of this power to subordinate jurisdictions, both judicial, and municipal.

The power of legislation is a high sovereign power, yet even that has been delegated with certain limitations to municipal corporations, and the power has never been disputed, but has been expressly sanctioned by judicial decision.

Judicial tribunals have been empowered from time to time to open roads for the public convenience, and the county commissioners or levy courts in some of the counties, possess, and exercise that power.

It is not perceived that the assessment of benefits equivalent to damages, if, in fact, the benefits are equal to the damages, on particular districts benefited, can be objectionable. Upon such principles, the roads in the counties are opened; the expenses are either levied on the counties generally, or on the petitioners immediately benefited. Why are roads opened? It is upon the ground that they are conducive to the general welfare; yet the expenses of opening them are levied not on the State, but upon the county benefited, in some instances; and in other instances, on a more circumscribed locality, if that should be found to be more immediately benefited. The determination that assessment of expenses cannot be made, as was contemplated to be done under this law, would in fact overturn nearly our whole system of county and city expenditures, and county and city taxes. The welfare of the whole State is promoted by the prosperity of each part, and the prosperity of each part is promoted by convenient highways; yet who would say, that the taxation for opening a road in one

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county, must, for these reasons, be laid upon the whole State? These roads promote the public welfare, yet the expenses are laid on the particular district more immediately benefited. This has been sanctioned by the practice of the government since its organization, and even in the counties, (where particular districts are peculiarly benefited, or presumed to be benefited, from the fact that persons petitioning for a given road) the expenses are levied or may be levied on the persons applying, instead of subjecting the whole county to taxation for the road.

Applying this practice of the State authorities, which has existed so long, to the principles upon which the law of 1838 is based, and I am clearly of opinion that no objection can be taken on constitutional grounds to the law of 1838, certainly in point of justice none can be taken. Each man according to the theory of this law, paying according and only equivalent to the amounts of his benefits, from the particular improvement made.

It is no objection to the mode in which this power has been executed by the city, that she pays no expenses, except that she is taxed with others for the benefits conferred on her property by the opening of the street; such a procedure is only equivalent to saying, that if the benefits are not equal to the damages, and the street cannot be opened in that way, it shall not be opened at all;—or in other words, there shall not be a general tax for opening the street. The law does not, nor does the ordinance, require any man to pay more than his benefits shall be valued at. The act of 1838, ch. 226, no doubt contemplated that the benefits from the opening of a street should be assessed on all the property within the city, benefited by such improvement; *and if it had satisfactorily appeared, that property benefited by such opening was exempted by the city authorities from the proposed taxation, no doubt the ordinance would be void, because, instead of carrying out the intention of the legislature, it would have been a violation of the system of taxation which the law proposed.* But the ordinance for opening *Fayette* street does not indicate in any of its provisions, that the property on *Baltimore* street, which it ex-

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empts from taxation, would be benefited by the opening of *Fayette* street; on the contrary, the presumption from such exemption is, that it was the opinion of the *City Council* that it was not benefited, and therefore should not be assessed. There is nothing in the ordinance to show that any property on *Baltimore* street was benefited, nor is there any averment in the bill that the property on *Baltimore* street was benefited. The only averment is, that *Baltimore* street is parallel with *Fayette* street, and next thereto, and that it is within the possible, if not indeed the probable range of fair assessment.

When the exercise of so high and extraordinary a power is called for, as the granting an injunction, attended with such consequences as the granting of this would be, I must see clearly and distinctly that a positive injury has been inflicted. It will not do in such a case to act on possibilities or probabilities. Suppose the injunction granted, it may turn out that by the exemption of property on *Baltimore* street, no injury has been done to the complainants, because the property on *Baltimore* street has not been benefited. Nay, it may appear that *Baltimore* street, being a great thoroughfare from *east* to *west* through the city, is, instead of being benefited materially, prejudiced by the opening of another street, (*Fayette*) parallel to it, through the city from *east* to *west*, and near thereto, by means of which the travel and business of the street is diverted to the street to be opened, and the property thereon situated thereby materially lessened in value.

The other allegations in the bill do not furnish any ground for an injunction. I have accordingly endorsed on the bill, in pursuance of the act of 1832, ch. 197, my refusal to grant the injunction.

From the refusal of the Chancellor to grant an injunction, the complainants prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS, SPENCE, and MARTIN, J.

By MAYER for the appellants, and

By B. C. PRESSTMAN for the appellees.

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MARTIN, J., delivered the opinion of this court.

In the argument of this case, the counsel for the appellants has contended that the act of Assembly of 1838, ch. 226, is to be considered as an unconstitutional exercise of legislative power, and that all the proceedings of the *Mayor and City Council of Baltimore*, with respect to the extension of *Fayette* street, as exhibited in the record, were unauthorized and void. And upon this ground he has claimed the interposition of the Chancery court, to protect the property of the appellants from the enforcement of a tax, which it is alleged was illegally imposed upon it.

But we think that the counsel for the appellant has not succeeded in establishing a want of power in the legislature to pass this act.

That the power, of appropriating to a public use the property of individuals, when the public necessity or utility requires it, upon securing to the party whose property is sacrificed, a just compensation for any injury he may sustain, resides in the State, as a portion of its inherent sovereignty, is a proposition which cannot be denied.

In defining the nature and extent of this power, in the case of *Bonaparte vs. The Camden and Amboy Railroad Company*, 1 *Bald. Rep.* 221, the learned judge, after stating that the complainant by his contract of purchase, authorized by the law of the State, is so far protected, that his property cannot be transferred to the defendants, without his consent, by mere legislative power, said:

“To make such a transfer valid, it must be an appropriation to a public use, in virtue of the inherent sovereignty of the States, which carries with it the obligation to make compensation. When this is done, no contract is impaired, as all persons hold their property subject to requisitions for public service; it is protected only against arbitrary seizure, not when it is taken or appropriated by public right for public use; compensation must indeed be made, but no particular mode is prescribed by which its amount shall be ascertained. It is a principle of *Magna Charta*, recognized in all the States, that



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no man shall be disseized or dispossessed of his property without due process of law, or legal process, or the judgment of a jury; but if either mode is pursued, the principle is unimpaired. A law which authorizes the appropriation of property to public use, and prescribes a mode of proceeding by which compensation shall be ascertained and made, is not obnoxious to *Magna Charta*, or its construction in *England* or in this State.”

It is this supreme and controlling power over the property of individuals, which enables the State to confer upon her subordinate jurisdictions, both municipal and judicial, the right to take private property for the purpose of opening streets and roads, when in their opinion, it is demanded by the public welfare or convenience; and when property is thus taken, and accompanied by an adequate provision for the indemnification of the injured party, the appropriation is legalized by the fact, that it has been taken for a public purpose, under the authority and sanction of the State.

It is not an arbitrary seizure of property, and therefore, is not in conflict with the principles of *Magna Charta*, or the provisions of the constitution.

The taxing power is a power of vital importance; it exists in the State, like that of the eminent domain, as a part of its inherent sovereignty; it is capable, from its nature, of being greatly abused, and yet this power was granted by the original and supplemental charters of the city of *Baltimore*, to the *Mayor and City Council*, to be exercised in their discretion, upon all property within the corporate jurisdiction and limits, and without any limitation with respect to the objects on which it was to operate. This grant of power to the city, has never been questioned, and in principle cannot be distinguished from the authority delegated to the *Mayor and City Council of Baltimore*, by the act of Assembly of 1838, ch. 226.

In the case of *Burgess vs. Pue*, 2 Gill, 11, the Court of Appeals held, that it was competent for the legislature to delegate the power of taxation to the taxable inhabitants of a school district, for the purpose of raising a fund for the support of primary schools; and we quote the opinion of the

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court, as directly applicable to the principle involved in this controversy. The court say—

“We think there is no validity in the constitutional question which was raised by the appellee’s counsel in the course of his argument, relative to the competency of the legislature to delegate the power of taxation to the taxable inhabitants, for the purpose of raising a fund for the diffusion of knowledge, and the support of primary schools. The object was a laudable one, and there is nothing in the constitution prohibitory of the delegation of the power of taxation, in the mode adopted, to effect the attainment of it; we may say that grants of similar powers to other bodies, for political purposes, have been coeval with the constitution itself, and that no serious doubts have ever been entertained of their validity. It is therefore too late at this day to raise such an objection. The ground of objection taken in the argument to the constitutionality of the tax, seemed to be, that the act of the legislature delegating the power of taxation to the taxable inhabitants, was a violation of the fourth and twelfth sections of the bill of rights, the first of which provides, ‘that all persons invested with the legislative and executive powers of government are the trustees of the public, and as such, accountable for their conduct:’ and the last, ‘that no aid, charge, tax, fee or fees, ought to be set, rated or levied, under any pretence, without consent of the legislature.’ It is not perceived how the act in question can be deemed a violation of either of those principles of the fundamental law. The tax was levied with the consent of the legislature, because the power to impose it emanated from the legislative department of the government, and was expressly given by a law passed for that purpose, and there is nothing in it which can be considered as impairing in the slightest degree the responsibility of the law-making power to their constituents, for the due and faithful execution of the trust confided to them; because, if deemed to be unwise or inexpedient, an expression of the popular will to that effect was all that was necessary to procure its repeal.”

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That the General Assembly possesses the power to delegate to the *Mayor and City Council of Baltimore*, and to the commissioners or levy courts of the counties, authority to alter or open streets and roads, when, in their opinion, such an improvement is required by the public convenience, is a proposition that has been, repeatedly, and in various forms, acknowledged by both the legislative and judicial departments of the government; and is sanctioned by a practical exposition of the constitution, as exhibited in the usage and practice of the State, for a long series of years.

A statute of *New York* granting to the corporate authorities of that city, a privilege similar to the one professed to be delegated by the act of 1838, was treated by the Chancellor, in the cases of *Livingstone vs. The Mayor of New York*, 8 *Wend.* 101 and *Wiggin vs. the same party*, 9 *Paige*, 23, as an undoubted exercise of legislative power, and, we think, that this question of power must be considered as too firmly settled in *Maryland* to be questioned or disputed.

By the sixth section of the ordinance of the 9th March, 1841, passed to carry into effect the powers granted to the *Mayor and City Council* by the act of 1838, ch. 226, it is provided:

“That the commissioners after having ascertained the amount of damages, and added thereto an estimate of the amount of expenses which will be incurred in the performance of the duties required of them, shall proceed to assess the amount of said damages and expenses on all the ground and improvements within the city, the owners of which, as such, the said commissioners shall decide and deem to be benefited by accomplishing the object authorized in the ordinance aforesaid, apportioning them in just proportion according to the value of the benefit, which in the estimation of the said commissioners will accrue to each owner of any right or interest claimed in any such ground or improvements.”

And it has been contended, that this ordinance is to be pronounced unconstitutional and void, on the ground, that it subjects the individuals embraced by it to an unequal and

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partial tax for the prosecution of an improvement in which the whole community is interested. But the error of the argument addressed to the court on this point, exists in a misapprehension of the nature and object of this assessment. No *burden* is imposed by it upon the person on whom it operates. It is a mere requisition, that the owners of property, the value of which is enhanced by the opening of the street, shall pay for the improvement in a *ratio* to the benefit derived from it.

It cannot be denied that injustice is sometimes inflicted in the application of this principle, by an extravagant estimate of the benefits conferred by the improvements: but when this occurs, the aggrieved party may appeal to the City Court, and contest the correctness of the assessment made by the commissioners before a jury of the country. And, assuming that the amount of the assessment is only equivalent to the benefit derived by the owner from the enhanced value of his property, nothing can be more equitable and just than that he should pay it.

In the matter of the *Mayor of New York*, 11 *John. R.* 77, the commissioners appointed by the court for the enlarging of *Nassau* street, made a report of their estimate and assessment of the damage and benefit to the parties interested, in enlarging the street, by which it appeared that they assessed the benefit of the proposed improvement to certain churches in the city of *New York*. The several churches objected to the assessment, on the ground, that they were exempt from it by virtue of the general tax act which declared, that no real estate belonging to any church, or place of public worship, should be taxed by any law of the State.

The claim of the churches was overruled; and we refer to the opinion of the court, as illustrative of the principle upon which this doctrine of assessments for benefits is supposed to stand.

The court said—

“The churches are not well founded in their claim to a total exemption of their lots from assessments, for opening, enlarg-



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ing, or otherwise improving streets in the city of *New York*, made in pursuance of the act of the 9th April, 1813. These assessments are directed and intended to be made upon the owners of lands and lots who may receive benefit and advantage by the improvements. The exemption granted by the act of 1801, was in the general act for the assessment and collection of taxes; and the provisions of that act all refer to general and public taxes to be assessed and collected for the benefit of the town, county, and State at large. The words of the exemption are, "that no church or place of worship, nor any school house, &c., should be taxed by any law of the State." The word "taxes" means burdens, charges or impositions, put or set upon persons or property for public uses, and this is the definition which *Lord Coke* gives to the word *talliage*, 2 *Inst.* 532, and *Lord Holt*, in *Carth.* 438, gives the same definition, in substance, to the word tax. The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value \$1,500. But to pay for the opening of a street, in a *ratio* to the benefit or advantage "derived from it, is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of the law, that *qui sentit commodum sentire debet et onus* is perfectly consistent with the interests and dictates of science and religion."

The same doctrine is enunciated by the Chancellor, in the case of *Livingstone vs. The Mayor of New York*, 8 *Wend.* 101; and, we think, that the act of 1838, ch. 226, and the ordinance of the 9th March, 1841, passed in pursuance of it, must be regarded in all respects as a valid exercise of legislative power.

It was manifestly contemplated by the legislature, that the amount of damages and expenses incurred in the improvement

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of the streets in the city of *Baltimore*, under the act of 1838, ch. 226, should be distributed in a rateable proportion among the owners of property especially benefited; and if it had appeared that the property in *Baltimore* street was enhanced in value by this extension of *Fayette* street, the ordinance of the 15th April, 1845, exempting this property from assessment, would be void.

But there is no allegation in the bill that the property in *Baltimore* street was benefited by this proposed improvement; and in the absence of such an averment, the objection that the ordinance is to be treated in this respect, as invalid, does not arise.

It is not to be supposed, that the Chancery court would be authorized to interpose its strong arm, and arrest by an injunction, the progress of this improvement upon the mere inferential and argumentative statement, that because *Baltimore* street and *Fayette* street were parallel, the property in the former street might, possibly, or even probably, be within the range of fair assessment.

As the property in *Baltimore* street is exempted from assessment by the provisions of the ordinance, the presumption is, that it was not benefited by the extension of *Fayette* street. And if it was the object of the complainants to call into action the preventive and conservative power of the Chancery court, for the purpose of enjoining the collection of this assessment, upon the ground, that the ordinance was void; the fact on which they relied to invalidate the ordinance, should have been expressly charged in the bill, and not left to inference and conjecture. This they have not done: and upon the case made by the bill, the ordinance is to be regarded, we think, as a valid exercise of the power delegated by the act of 1838, ch. 226.

It is perfectly clear, that the Court of Chancery has no jurisdiction to supervise or re-examine the proceedings and judgment of the City Court, with respect to these assessments. 4 *John. Ch. Rep.* 352. And we think, that the order of the Chancery, refusing this injunction, was correct, and must be affirmed.

ORDER AFFIRMED.

REBECCA SOMERVILLE vs. DAVID U. BROWN.—*December, 1847.*

In October, 1841, *R.* being indebted to a firm, of which *C.* was a partner, gave her notes, at his request, dated 1st November, 1841, payable in instalments at from one to five years, for the amount of the debt. One of those notes *C.* transferred to *A.* by way of security, and when it fell due *R.* gave her renewal note for a part of the same, also dated 1st November, payable in two years and six months, and due 1st May, 1844, to *W.*, the brother of *C.*, who endorsed it to the plaintiff. The time of that transfer did not appear. In an attachment commenced by a creditor of the firm, on the 10th January, 1842, against *R.* and *T.* as garnishees of *C.* survivor of such firm, judgment of condemnation was rendered in January, 1843, of said renewal note, in favor of the attaching creditor. On the 14th June, 1842, *C.* applied for the benefit of the insolvent laws of *Maryland*, and there was evidence tending to prove that he was *then* the holder of the said renewed note. *Held*, that if the jury believed that *C.*, when the attachment was issued, or when he applied for relief under the insolvent laws, was the holder of the said renewed note, then the endorsee of *W.* was not entitled to recover its amount from *R.*

An attachment laid in the hands of the maker of a promissory note, as garnishee, for the debt of an endorsee then being the owner and holder of the note, followed by a judgment of condemnation on the attachment, will protect the maker, garnishee, in a subsequent action, brought on the same note, by a subsequent endorser receiving the note without notice.

In a case of *first impression*, depending on a statute, of which the language was capable of a construction which might avoid embarrassment to the commercial, or any other portion of the community, the argument of inconvenience would justly have controlling influence. The act of 1796, ch. 56, in terms declares that a creditor, on certain conditions, may attach the lands, tenements, goods, chattels and credits of his debtor, speaks also of the liability of "a garnishee who is indebted in any sum of money," and is in this respect but a repetition of the act of 1715, by which an attachment was authorized against all goods, chattels and credits in the hands of any person whatever, and consequently authorizes the attachment of a debt due on a promissory note before its maturity in the hands of the maker, while the debtor continued the owner and holder of the note.

Our whole system regulating the relation of debtor and creditor, is designed to subject every dollar's worth of property, real, personal and mixed, to the just claims of a creditor, and so exempt the honest debtor who does surrender all such property, from the grasp of a relentless creditor, who might desire to imprison his person, or weigh down his future energies by the impending burthen of his debt.

Inconvenience alone will not induce the court to construe an act, directly in violation of its plain language and apparent design.

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If the debt due on a negotiable note could not properly be the subject of an attachment until after its maturity, still, if the maker of the note, in a contest, in such a case, fairly resisted, has been adjudged by a court of competent jurisdiction, to pay such a debt to an attaching creditor of the holder of the note, such maker would find a defence in such a judgment of condemnation, and not be adjudged to pay the same debt twice.

The insolvency of the holder of a note or bill of exchange, passes the title thereto to his trustee, and disables the insolvent from conveying an interest in the bill or note, after the date of his personal discharge, and before its maturity, even to an endorsee without notice of his insolvency.

### APPEAL from *Baltimore County Court*.

This was an action of *assumpsit* docketed by consent to November term, 1844, by the appellee against the appellant. The declaration contained the common counts, to which the defendants pleaded the general issue. The verdict and judgment were for the plaintiff.

At the trial of the cause, the plaintiff proved the following note of the defendant.

“*Baltimore*, 1st Nov’r, 1841.

\$ 822 19. Two years and six months after date, I promise to pay *W. T. Somerville*, or order, eight hundred and twenty-two dollars and nineteen cents, for value received.

*R. Somerville.*”

And the endorsement thereon—

“Pay *David U. Brown*. *W. T. Somerville.*”

The defendant then to support the issue on her part, proved the following attachment in *Baltimore county court*, and judgment therein.

The *Bank of New Orleans vs. Rebecca Somerville* and *Tiernan Somerville*, garnishees of *Charles Tiernan*, surviving partner of *Luke Tiernan*.

Att’d on judg’t, 10th Jan. 1842, app. for garns, rule plea, 18th March, 1842, plea *nulla bona* and notice to reply filed, rule rep. same day service of copy and notice of rule admitted, same day gen. rep. fd. service of copy admitted. Continued to May term. Continued to September term. Continued to January term, 1843.



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27th *January*, 1843. Jury sworn. Verdict for plaintiff. Damages \$10,000. Judgment of condemnation on verdict against garnishees for \$10,000, with interest from 27th *January*, 1843, subject to agreement, filed. This judgment to be released on payment of \$500 on 1st *May*, 1843, of \$500 on 1st *November*, 1843, of \$822 19 on 1st *May*, 1844, of \$1,000 on 1st *November*, 1844, of \$1,000 on 1st *November*, 1845, of \$1,000 on the 1st *November*, 1846, and of \$2,000 on 1st *November*, 1847, with a stay on the several amounts as they become due, terms filed.

The defendant also offered in evidence the application of the said *Charles Tiernan* as an insolvent debtor, for relief, to the commissioners of insolvent debtors for the city and county of *Baltimore*, on the 14th *June*, 1842, the proceedings thereunder, the appointment and binding of his permanent trustee, and his final discharge from his debts and creditors, dated 17th *November*, 1842, with a variety of schedules, showing said insolvent's debts and credits at the time of his aforesaid application.

The defendant also proved that the debt now sought to be recovered was part of the debt stated in said schedule.

The plaintiff then offered *Charles Tiernan* as a witness, who was admitted subject to exceptions, and he proved that in *October*, 1841, he came to a settlement with *Mrs. Somerville*, the drawer of a note due to *L. Tiernan & Sons*, and then (in *October*) took her notes for five thousand dollars, payable annually from 1st *November*, 1841, for five years, in the sums of \$1,000 each; that the first of these notes, sometime before, he transferred to his brother *William* to secure a debt of \$453 due him, and a sum due *Mr. Cooney*, and \$150 due by deponent to *John Nelson, Esq.* as a fee, which when said note fell due, was paid by *Tiernan Somerville* to said *Nelson*, and this note is a renewal in part of that \$1,000 note, though dated 1st *November*, 1841, and that the other of said notes were passed to *Thomas Penny*.

The defendant then gave in evidence, that *A. W. Bradford, Esq.* appeared to said attachment by direction of *Charles Tier-*

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nan, and did not remember being told by him that he had passed away said notes, although he might have said so. That he, *Tiernan*, did set up as a defence that the notes were given to him in a different character from that in which the attachment was levied. Defendant also proved that *Penny* was agent of *Lake Tiernan* during his lifetime, and now has charge of the business of *Tiernan, Cuddy & Co.* and *W. H. Tiernan*, deponent's brother.

1. The defendant prayed the court that said *Charles Tiernan* was not a competent witness in this case.

2. If the jury believe that *Charles Tiernan*, at the time when the attachment was issued, and when he applied for the insolvent laws, was the holder of the note now in suit, then plaintiff is not entitled to recover in this cause. Which opinions and directions the court (ARCHER, C. J., PURVIANCE and LE GRAND, A. J.,) refused to give. The defendant excepted.

The defendant appealed to this court.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By McMAHON for the appellant, and

By DAVID STEWART and C. F. MAYER for the appellee.

DORSEY, J., delivered the following dissenting opinion.

The correctness of the court's decision in overruling the appellant's objection to the testimony of *Charles Tiernan*, being conceded, the only remaining inquiry is, did the county court err in refusing to grant the appellant's second prayer, "that if the jury believe that *Charles Tiernan* at the time when this attachment was issued, and when he applied for the insolvent laws, was the holder of the note now in suit, then the plaintiff is not entitled to recover in this cause."

To prove the appellant's right to the instruction denied to him by the court, it has been broadly asserted, (and the assertion backed by an elaborate argument) that if an attachment be laid in the hands of the maker of a promissory note endorsed in

blank, and yet undue, to bind the interests of a holder thereof for a debt due by him to the plaintiff in the attachment, and the note be subsequently, and before its maturity, negotiated or sold by the holder to a third person in the due course of business, *bona fide*, for a valuable consideration, and without notice, that the plaintiff in the attachment is entitled under that proceeding to recover from the maker the amount of the note, and that by such transfer the third person thus holding the note, acquired no right of action against the maker thereof. And this doctrine, as I humbly conceive, so utterly inconsistent with all the principles of the law-merchant, as to bills of exchange and promissory notes, which law-merchant exists to as full an extent in *Maryland* as in *England*, is ascribed to the alleged true construction of the 1st section of the act of Assembly of 1795, chapter 56, which authorizes the levying of an attachment as well upon the the "credits of the debtor, as upon his lands, tenements, goods and chattels."

There is nothing in the language of this act of Assembly, or in the evils it was designed to remedy, or in the object sought to be accomplished by it, which should conduct us to the conclusion, that it was the intent of the Legislature to effect so impolitic and inconvenient an innovation upon the mercantile law and usages of the State; to interpose an obstacle to its commercial prosperity, so unwise and so uncalled for. Full import and meaning may be given to every word and expression in this act of Assembly, without imputing to the General Assembly that suicidal intent attempted to be imposed upon their act. If it were the design of the Legislature to change and repeal, to the extent ascribed to it, the law-merchant, as to the protection thrown around *bona fide* transferees for value of bills of exchange and promissory notes, no sound reason can be assigned, why all similar protection should not be wholly withdrawn from them, and commerce be deprived of those facilities and safeguards which commercial wisdom and experience have for ages cast around it as essential and indispensable to its prosperity.

And why is it, that this construction of the act of 1795, so disastrous to commerce and the best interests of the State is to

be resorted to? Because the credits, as well as the goods and chattels of the debtor, are made liable to an attachment. Does the term "credits," as thus used in the act of Assembly, in any degree warrant the enlarged and forced construction attempted to be given to it? I humbly conceive that it does not. The term "credits," when applied to the case before us, means the right which the debtor-holder of the note had to recover its amount from the maker. What was the nature of that right? Was it an absolute, unqualified engagement of the maker to pay the amount of the note to *Charles Tiernan*, without reference to future events or contingencies? Unquestionably not. By the endorsement of the note in blank, though it might be held by *Charles Tiernan*, it was not an unqualified promise of the maker to pay the note to him, whether at its maturity, he should remain the holder therefor or not; but undeniably the promise was, as well in fact, as in contemplation of law, to pay the note to the bearer; or to him, who, at its maturity should be the *bona fide* holder thereof. Can it then be contended for a moment that the service of the attachment in this case entirely changed the contract of the parties, and converted an agreement theretofore, contingent and conditional, into one, that was certain and unqualified? The act of 1795, applied as well to contracts existing at its date, as to those subsequently entered into: to give it then the construction insisted on by the appellant, would be to impute to the Legislature in its passage an intention to impair the obligation of contracts, and violate the Constitution of the *United States*. An imputation which no court of justice should make, but from cogent necessity; and according to the best consideration I have been enabled to give the subject, could not be otherwise than gratuitously made on the present occasion.

In rendering credits the subject of attachment, all that the Legislature designed to effect thereby, in a case like the present, was to substitute, as it were, the attaching creditor to the rights of his debtor-creditor; and to enable the former to recover that which the latter would have been entitled to recover, had no attachment been issued. It did not mean to change the



nature of the credit, and to withdraw it from the operation of the law-merchant, the law of the land, and to give to the attaching creditor rights which would have been denied to the debtor-creditor, had no attachment have issued. It gave no higher or superior rights to the credit, to the attaching creditor, than those that would have belonged to the debtor-creditor, had no attachment intervened.

The design of the act of Assembly was simply to provide the means by which the attaching creditor could as effectually recover the credit as could the debtor-creditor, had no attachment been interposed. In conferring on the attaching creditor the power with which he was invested, by the act of Assembly, the Legislature never dreamed that they were repealing any part of the law-merchant in relation to bills of exchange or promissory notes; or that they were investing him with rights and powers superior to those which he would have possessed had a *bona fide*, absolute transfer and delivery of the promissory note been made to him by his debtor-creditor. For such a discrimination by the Legislature, no conceivable motive or reason can be assigned. Nay, so far from greater or superior rights being transferred to the creditor, in the former, than in the latter case, he is clothed with diminished and inferior rights. In his recovery of the credit, he would be subject to all the discounts, setts off, pleas in bar, and defences of which the maker of the note could avail himself, if the action on the note were prosecuted by the debtor-creditor himself; whereas, in the latter case, he would be exempt from all such defences.

It may be said that such a construction of the attachment laws would leave it in the power of the creditor-debtor, the holder of a promissory note endorsed in blank, to evade the effect of the attachment by making, to a person not notified of the attachment, a *bona fide* transfer and delivery of the note. To such a contingent defeat of all benefit from his process is an attaching creditor exposed. But that exposure is nothing more than a qualification or restriction incident to the rights acquired under the attachment; and imposed upon them by the law-merchant for the benefit of commerce, for the good of the

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public. It does him no wrong; it deprives him of no right; it but qualifies the favors which the law confers upon him. It is an implied qualification of such favors that is indispensable or necessary to the prosperity of commerce and the interests of the community. Not to make such an implication would be to annihilate the negotiability of promissory notes and bills of exchange, or to authorize by legislation the practice of frauds upon the public. Neither of which results can, upon any principle of sound construction, be regarded as having entered into the contemplation of the Legislature in the passage of the act of 1795. The only mode by which the attaching creditor can protect himself against the transfer of the note by his creditor-debtor is through the auxiliary interposition of a court of equity in aid of his proceedings at law.

Of the effects of the law-merchant upon his rights the attaching creditor has infinitely less cause to complain than has the owner of a promissory note endorsed in blank, which being before its maturity withdrawn from his possession, forcibly, fraudulently, surreptitiously or feloniously, is passed as aforementioned to a *bona fide* transferee. In any such case the *bona fide* transferee becomes the absolute proprietor of the note, and holds it discharged of all claim by the original and rightful owner.

It has also been contended that the pendency in *Baltimore* county court of the attachment suit, by the *Bank of New Orleans* against *Charles Tiernan*, which was laid in the hands of *Rebecca Somerville*, is a *lis pendens*, of which the appellee was bound to take notice, and from which the law imputes to him a knowledge of the fact, that a condemnation of the amount due on the note in question was sought by that suit. Without relying upon the principles that according to the law-merchant to such a transferee no knowledge of a *lis pendens* is to be imputed, even though its examination would establish the knowledge imputed; let us see whether the *lis pendens* in this case, if known to the appellee, could form a sufficient basis for the alleged imputation of knowledge. The proceedings in the attachment by the *Bank of New Orleans*

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against *Charles Tiernan*, as laid in the hands of his garnishees, *Rebecca and Tiernan Somerville*, disclosed the facts that the plaintiff claimed of *Charles Tiernan* some \$10,000, and that he sought a condemnation for that amount of the rights and credits of *Charles Tiernan* in the hands of his garnishees. But did that, if known to the appellee, communicate to him the fact, that the note in question constituted any part of such rights or credits, or that *Charles Tiernan* had ever owned, seen or heard of it? Against the claim of the appellee, therefore, the appellant in such a defence can obtain no protection.

Another ground upon which the appellant urges her right to have obtained from the county court the instruction required by her second prayer, is, that the note having been in the possession of *Charles Tiernan* at the time of his application for the benefit of the insolvent laws of this State, the title thereto passed to his trustee by operation of law, and that no interest in or title to the note could be acquired by any body but by a transfer from such trustee. There is nothing by which such a position can be sustained. In making the legislative transfer mentioned, there is nothing to induce a momentary belief that the Legislature contemplated any innovation in the law-merchant, as to the means by which a title to negotiable paper might be acquired. The design of the law was simply to invest the trustee with the same title to the property of the petitioner that he would have acquired under a formal deed of conveyance. The property of the insolvent when thus cast upon the trustee had no peculiar safeguards around it for its especial protection; but in his hands was subject to all the casualties and incidents to which like property was exposed when owned by any other person.

Having thus far examined this case with reference to the general principles of law applicable to it, and to the true construction of the act of Assembly under which it arises, I shall now proceed to the consideration of the judicial determinations upon the subject, by which it is alleged, that it is conclusively shewn, that the county court erred in refusing to instruct the

jury that the plaintiff below was not entitled to recover. These adjudications, it is asserted, unanswerably prove, that the service of an attachment issued against the holder of a promissory note before it is due, endorsed in blank, upon the maker thereof, puts an end, as far as the attachment is concerned, to the negotiability of the note: and that its subsequent transfer to a third person before it becomes due *bona fide*, for a valuable consideration in the due course of business, and without any notice of such attachment, passes no title to the note, but in subjection to the attachment. Before the court could have granted the prayer, it must have assumed the truth of all the above facts, as respects the transfer of the note to the appellee, because there was evidence before the jury, from which they were authorized to have found them.

The first authority cited, and which has been pressed upon this court as decisive, in favor of the appellant, of what is the law in Maryland on the question before us, is the case of *Stewart vs. West*, garnishee of *Jenners*, reported in 1 *Har. & John*. 536. But that case, when attentively considered, is entitled to no such effect as has been imputed to it; and is in perfect consistency with the judgment rendered in this case by the county court. That I may not be misconceived in the views I entertain, in the case presented by the record before us, I deem it necessary to state, that I fully concede, what I regard as fully settled by, the case referred to 1 *Har. & John*. (and before that decision, I do not see how any doubt could have existed upon the subject) that by the attachment laws of Maryland, "where the garnishee is indebted to the defendant, by a promissory note, and an attachment is laid in his hands before such note is passed away by the defendant, whether it be before or after it is due, it is a lien on the amount of the note." This is all that was established by the case of *Stewart vs. West*, as stated by the reporter in his synopsis thereof. But in making that concession, I, by no means admit, that if subsequently to the service of the attachment, and before the note becomes due, it be endorsed in blank, or made payable to bearer, and be negotiated in the due course of business to a *bona fide* transferee for



value and without notice, that the lien is not thereby lost, and the title of the transferee, in virtue of the law-merchant, become absolute and indefeasible, and discharged from the lien. The facts in proof in the case of *Stewart* and *West* raised no such questions, and consequently by no legitimate inference can it be assumed, that the General Court determined or designed to determine, any such question. The case of *Stewart vs. West* is most briefly reported, without any opinion of the court, or argument of the counsel, from which it can be inferred that the court did any thing more than decide the prayer in reference to that state of facts only, which were in proof in the cause. Let us examine what those facts were, and we at once perceive all that the General Court meant to decide.

*Stewart vs. West* was an appeal from *Prince George's* county court, in which it appeared, that the appellant, on the 14th of June, 1800, issued out of the said court, on a judgment therein, in which he was plaintiff, and *Jenners* defendant, an attachment, which on the 15th June, 1800, was laid in the hands of *West*, who appeared, and pleaded *nulla bona*.

At the trial, the defendant produced and read in evidence the following promissory note :

“Sixty days after date, I promise to pay *Mr. Abiel Jenners*, or order, one hundred dollars, negotiable at the *Bank of Columbia*, for value received. *Stephen West.*”

And proved the signature of *Abiel Jenners* to the following endorsement thereon, viz :

“For value received, I do hereby assign over all my right, title and interest to the within note, to *Col. Solomon Simpson*, this 18th of April, 1800. *Abiel Jenners.*”

There was also endorsed upon the note :

“*Mr. West.* Sir : Please to pay the within to the bearer. *Solomon Simpson.*”

But no evidence was adduced of the signature of *Solomon Simpson* : nor was there any proof by the defendant, except the said endorsement signed by *Jenners*, that the note had ever been negotiated to any person, or that he received any consideration or value for the said endorsement, or under what

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circumstances it was made, or that it was ever delivered to *Solomon Simpson* or any other person other than *West* himself. And upon this proof of the defendant rested his case.

The plaintiff then proved by a witness that the note was passed to him by *Abiel Jenners*, as the owner thereof, whether before or after it became due he did not recollect; but if before it became due, it was but a few days; that it was after it became due that he presented it to *West* for payment; that he held said note from five to ten days before he presented it to *West*. Upon the proof thus offered, the case was submitted to the jury, with the following prayer to the court by the plaintiff:

“That if they were of opinion from the evidence offered, that the above mentioned promissory note was in the hands of said *Abiel Jenners*, as the owner thereof, at or after the time when the attachment in this case was laid in the hands of *West*, the garnishee, that then the attachment was a lien, and bound whatever money was due on the note from *West*, in the hands of *West*.”

The prayer being refused on an equal division of the court, on an appeal to the General Court, the judgment of the county court was reversed. And of the propriety of such reversal I can see nothing to induce me to entertain a momentary doubt. To transfer to an endorsee or transferee of the character hereinbefore described, such a paramount title to the note as will over-ride and defeat, according to the law-merchant, all prior equities, liens and rights of property in the note, the endorsement or transfer, must be supported by a delivery of the note.

In the case of *Stewart vs. Jenners*, there was not a particle of proof, direct or inferential, from which the jury could find the fact of such delivery, and, of consequence, the lien created by the attachment standing unaffected by the alleged endorsement to *Col. Simpson*, the prayer of the plaintiff ought to have been granted by the county court, and for its failure to do so, its judgment could not be otherwise than reversed by the General Court. So far from its appearing that the note, under the endorsement thereon, was ever delivered to, or put in possession of *Col. Simpson*, the alleged endorser, the testimony

on the part of the plaintiff clearly showed, either that the endorsement was a fabrication, or if *bona fide*, and the delivery of the note accompanied it, that it afterwards came into the possession of *Abiel Jenners*, “as the owner thereof,” and was by him negotiated to the witness. But such negotiation being unsustained by any consideration therefor, the witness held the note subject to the same lien by the attachment, to which it was obnoxious in the hands of *Abiel Jenners*. The assertion then, that the principle has been settled by a judicial decision of the late General Court, that in a case like that now before us, the lien of the attachment has priority over the rights of a transferee of the note, in the condition of the present appellee, is not established by the authority relied on for that purpose.

And after a careful examination of all the cases from other of the *United States*, which in the argument of this cause, have been confidently relied on for the establishment of such a principle in *Maryland*, my mind has been irresistibly brought to the conclusion, that there is not one of them entitled to the weight of a feather for such a purpose.

The first of those cases was *Coit against Hull*, *Kirby's Rep.* 149. That case gave not the slightest colour to the principle now sought to be sustained by it. The question now before us does not appear to have been presented in that case. The plea that was demurred to did not show that the note was payable on time; that it was not due at the time of the subsequent transfer; that it was not overdue at the time the attachment was laid; and it was at that time, and in that case, denied that promissory notes were transferrable in that State.

The next case was that of *Huff vs. Mills*, 7 *Yerger*, 42, the principles of which decision rather militate against, than for the appellant here, as will appear by the synopsis of the case, which is as follows:

“A debt secured by a negotiable paper, upon which suit has been brought, may be attached in the hands of a garnishee. The answer of the garnishee is conclusive as to his liability. If a garnishee state that he executed a negotiable note or bill

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single, but did not know who holds it, or whether it be assigned or not, he does not state that he is indebted to the debtor of the attaching creditor, and no judgment can be given against him. But when the garnishee states he executed the note, that it has been sued on, and that there is no judgment on it, he is liable as a garnishee, and judgment must be entered against him as such."

In this case the note was already due, and suit brought thereon by the payee, before the attachment issued, and it was in reference to such cases that the court were speaking. Where a garnishee has not been called on to answer interrogatories, to entitle the attaching creditor to a judgment, he must prove the existence of the same facts, which would have secured him a judgment, had they appeared in the response of the garnishee.

The next case relied on by the appellant is that of *Scott and Rule vs. Hill and McGunnege*, 3 *Missouri Rep.* 88, which, if construed without reference to any other judicial decisions of that State, or the statutes thereof, would be a direct authority in favor of the doctrine contended for by the appellant. But it is only necessary to refer to the case of *Bates vs. Martin* in the same book, page 367, to discover that the law-merchant and the statute of 3 and 4 *Anne*, in regard to promissory notes, as adopted and prevailing in *Maryland*, have not been adopted and do not prevail in *Missouri*; but that, by the statutory enactments of that State, there exists there a peculiar law-merchant in relation to promissory notes, bonds, &c., (all of which stand on the same footing,) wholly dissimilar to that prevailing in *England* and in *Maryland*, and which has prevailed and been practised under, ever since the 3 and 4 of *Anne*.

In conformity to this peculiar and anomalous statute law of the *State of Missouri*, was the case of *Scott and Rule vs. Hill and McGunnege* decided; and therefore, it has no application whatever to the case now before us. And if further authority on the subject were necessary, it is found in the case of *Rector, &c. vs. Honore, &c.*, 1 *Missouri Rep.* 204, where it was expressly declared that the statute of *Anne* is not in force in *Missouri*.



The next case referred to, and strongly relied on, in the argument of this case, as of controlling authority, is the case of *Dore vs. Dawson*, 6 *Alabama Rep.* 712, which certainly would be a decision, in favor of the appellant and directly in point, if it had been made under the same principles of commercial law, in reference to promissory notes, that have always prevailed in *England* and in this State, since the passage of the statute of 3 and 4 *Anne*. But that no such principles of commercial law exist in *Alabama*, is conclusively demonstrated in the same volume of the *Alabama Reports*, page 156, in the case of *Beal and Bennett vs. Wainwright, Shields & Co.*, and therefore the case of *Dore vs. Dawson* has not the semblance of authority on the question to be adjudicated in the present appeal. The case of *Dore vs. Dawson* was determined upon the particular statute of *Alabama*, which may be found in 9 *Porter's Rep.* 447–8, *Smith vs. Strader, Perine & Co.*, and gives a qualified negotiable character to promissory notes, and “all bonds, obligations, bills single, bills, and all other writings for the payment of money or any other thing.” But this statute expressly provides, that “in all actions to be commenced and sued upon any such assigned bond, obligation, bill single, promissory note, or other writing as aforesaid, the defendant shall be allowed the benefit of all payments, discounts and sets-off, made, had or possessed as against the same, previous to notice of the assignment, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein.”

The next case on which the appellant relied, was that of *Williamson et al. vs. Bowie*, 6 *Munford's Rep.* 176. This case has nothing to do with the principle now in question before us; and if any analogous question were there decided, it could be of no authority in this State, because the law-merchant, as to promissory notes, under the statute of *Anne*, is not recognized in *Virginia*. See the case of *Stewart vs. Anders*, 6 *Cranch*, 203.

The case of *Chase et al. vs. Houghton et al.* 16 *Vermont Rep.* 594, was also relied on, in the argument for the appellant. But the slightest examination of that case must satisfy

anybody that it can have no weight in the decision of the case now before us; because it appeared at the trial, on the trustee's process, not, as here, that the note, before its maturity, had been transferred to a *bona fide* holder for value; but that it was the property of the payee at the time it was due; and that a suit was then pending in his name against the garnishees for the recovery thereof.

The only remaining case which was referred to and relied on by the appellant in reference to the question now under consideration was the case of *Hull vs. Blake*, 13 *Mass. Rep.* 153, which cannot have the slightest influence upon the case before us, until all the principles of the law-merchant, in relation to promissory notes which have prevailed in *Maryland* from the time of the passage of the 3 and 4 of *Anne* to the present time, shall be annulled or repealed. All that was decided by the Supreme Court of *Massachusetts* in *Hull vs. Blake* was, that a court in *Georgia*, on promissory notes given in that State, having determined that in an action of debt by one of his creditors against the payee of the notes, by summoning as garnishee the maker of the notes, a recovery could be had against him of the amount of such notes, although the notes, previous to the commencement of such action of debt, and before the notes became due, may have been *bona fide*, and for value transferred to an endorsee, the court in *Massachusetts* were bound to assume that the judgment of the court in *Georgia* was conformable to the laws of that State. The propriety of such a decision, it appears to me, cannot for a moment be doubted. The notes there in question being *Georgia* contracts, must, in their construction and operation be governed by the laws of *Georgia*, which laws in reference to those contracts, having been adjudicated by a court in *Georgia* of competent jurisdiction, upon every principle of judicial comity, was the court of *Massachusetts* bound to give efficacy to those contracts in subjection and conformity to the judicial proceedings of the court in *Georgia*. In other words, the court in *Massachusetts* in respect to the case before it, could not do otherwise than assume, that, in the State of *Georgia*,

promissory notes were not subject to the law-merchant, as established by the statute of *Anne*. What possible relevancy or influence can the decision of the court in *Massachusetts* in the case of *Hull vs. Blake* have upon the case now submitted to our determination? Are we justified or required by it, in construing a *Maryland* contract, between *Maryland* parties litigant, contrary to our undoubted knowledge upon the subject, and the numerous decisions of this court, and indeed of every court of law and equity in the State, to assume that the law-merchant, as to promissory notes as established by the statute of *Anne*, has never been adopted in this State? If the decision of the Supreme Court of *Massachusetts* in the case of *Hull and Blake*, does not involve us in such an assumption, it has not the shadow of an analogy to the case before us, and cannot have the slightest bearing upon it. That the decision of the court in *Georgia*, could be for a moment sustained in *Maryland*, nobody would contend.

It has been suggested that in analogy to the court's decision in *Hull vs. Blake*, this court ought to regard the question now under our consideration, as correctly decided, and settled by the alleged decision of *Baltimore* county court in the case of the *Bank of New Orleans vs. Rebecca Somerville and Tiernan Somerville*. This suggestion is unquestionably entitled to the merit of peculiar novelty. If an adjudication, at *nisi prius*, by the two Associate Judges of *Baltimore* county court (they only having sat in the case of the *Bank of New Orleans vs. Somerville*,) is to be forever conclusive in all future cases, as to all questions of law by them decided, it is difficult to assign a satisfactory reason, why a Court of Appeals should longer continue a part of the judicial system of the State; being thus rendered an useless burden upon the community. But it is somewhat remarkable, that it did not occur to the suggester of this innovation, that the principles of law, determined in the *nisi prius* case, to which such deferential submission is required, have been over-ruled by the judgment of *Baltimore* county court now for review before us. And that such over-ruling was not only the act of the two Associate Judges of that

court, but was the result of the unanimous opinion of the three Judges thereof; the chief of whom is also the Chief Judge of the Court of Appeals of *Maryland*. But there is another reason why I cannot yield submission to the conclusiveness of this venerated *nisi prius* judgment; which is, that no such question as that now before us, was submitted in that case, to the decision of the county court, or was decided by it; on the contrary, the judgment was entered in pursuance of a written compromise or arrangement between the parties themselves, in relation to which the court had no agency.

It was urged that as promissory notes given in violation of the statute of gaming and usury, no matter into whose hands they may pass, are irrecoverable, and of no validity, that the same principle should be applied to the note before us. But I can discover no analogy between the two cases. The statutes against gaming and usury, declare all notes given for gaming or usurious transactions, to be absolutely null and void, without any reservation, either express or to be implied of the rights of any person, who, under any circumstances, may become the holder thereof. In conformity with the positive language of these enactments, and from motives of public policy, and with a view to restrain two great and increasing vices which threatened, as was believed, to overwhelm the morality and prosperity of the nation, it was decided by the courts of *England* (and those decisions have followed by the judicial tribunals of this State and elsewhere,) that it was the design of the Legislature that the statutes against gaming and usury should be paramount, and control the law-merchant as to promissory notes issued in violation of them, but even with such high motives for its adoption, this innovation upon the law-merchant has been regretted, if not condemned by many of the most distinguished jurists of *England*. Can ingenuity itself, upon any sound principle of construction, assimilate the cases which have been adjudicated under the statutes of usury and gaming, to the case before us, under the attachment law of *Maryland*? I respectfully believe that it cannot.

On the part of the appellee, but two authorities were referred



to. The first was *Sergeant on Attachment*, pages 85–86, which in the most explicit manner sustains the decision of *Baltimore* county court, on the identical question now before us.

The second authority is that of *Ludlow vs. Bingham*, 4 *Dallas*, 47. This case, decided in the High Court of Errors and Appeals of *Pennsylvania*, by the unanimous opinion of that court, delivered by that distinguished jurist, *Thomas McKean*, then the Chief Justice thereof, after a most thorough and elaborate argument by the most eminent lawyers of the State, (one of whom was *E. Tilghman*, the late Chief Justice of that State,) is to my mind conclusive upon the case before us. The principle there determined, was identical with that to be decided in this case, with this difference only, that in the case in *Pennsylvania*, it was conceded by the counsel sustaining the efficacy of the attachment, (of whom *E. Tilghman* was one,) that if the law-merchant of *England*, in relation to promissory notes (which is undeniably the law of *Maryland*,) had been the law of *Pennsylvania*, the attachment laid in that case could have interposed no barrier to the subsequent *bona fide* holder of the note for value. And the only ground upon which they resisted such holder's right of recovery was, that their statute law upon the subject was different from the commercial law of *England* and *New York*. In the argument of the case before us, the learned counsel for the appellant has not even intimated that the law-merchant of *England*, as to promissory notes, is not the law of *Maryland*.

After a careful examination and mature consideration of all the cases referred to in the argument upon the case before us, I have not been able to discover even a dictum, when properly understood, much less an adjudication, in the slightest degree conflicting with the decision of the court below in this case; or with that of *Ludlow vs. Bingham*, as far as the present controversy is concerned.

Being unable to doubt for an instant, the correctness of the county court's refusal of the second prayer of the appellant, which is the only question before us on the present appeal, I think its judgment ought to be affirmed.

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CHAMBERS, J., delivered the opinion of this court.

This was an action of *indebitatus assumpsit*, with the usual money counts. The general issue, *non assumpsit*, was pleaded.

There is no difficulty made in regard to the pleadings. At the trial the appellee, the plaintiff below, offered in evidence a promissory note, made by the appellant, the defendant, on the 1st November, 1841, for \$822 19, payable in two years after date to *W. T. Somerville*, or order, and by him endorsed, payable to appellee, or order.

The defences set up were *first*: a verdict and judgment of condemnation in *Baltimore* county court, on the 27th January, 1843, against the appellant, and *W. T. Somerville*, as garnishees of *Charles Tiernan*, surviving partner of *Luke Tiernan & Sons*, in favor of the *Bank of New Orleans*, by which judgment it was alleged the money or debt sued for in this action was condemned in the hands of the appellant, and made liable to the *Bank*, the plaintiff in that action.

And *secondly*, the application of said *Charles Tiernan* for the benefit of the insolvent laws of the State, on the 14th June, 1842, and his subsequent discharge, pursuant to said insolvent laws.

At the trial the defendant offered the record of the verdict, and judgment of condemnation thereon, in the case of the *Bank of New Orleans* against her, by which it appears the attachment was issued on the 10th January, 1842, to which she appeared, and in March, 1842, pleaded *nulla bona*, on which plea issue was joined, and verdict and judgment rendered 27th January, 1843, for plaintiff, for the following sums, to wit: \$500 to be paid 1st May, 1843. \$500 on the 1st November, 1843. \$822 19 on the 1st May, 1844. \$1,000 on the 1st November, 1844. \$1,000 on the 1st November, 1845. \$1,000 on the 1st November, 1846, and \$2,000 on the 1st November, 1847: making an aggregate sum of \$6,822 19.

In reference to this ground of defence, parol testimony was also taken.

*Charles Tiernan* was produced as a witness by the plaintiff, and objected to as incompetent; but that objection is understood

to be now waived and properly so. His testimony, as stated, is singularly cloudy. It is "that he came to a settlement with the appellant in October, 1841, of a debt due to *Luke Tiernan & Sons*, and then (in October,) took her notes for \$5,000, payable annually from 1 November, 1841, in the sums of \$1,000 each, that the first of these notes some time before" (before when not being stated) he transferred to his brother *William*, to secure a debt of \$453 due him, and a sum due *W. Cooney*, and \$100 due by deponent to *J. Nelson, Esq.* as a fee—which when said note fell due, was paid by *Tiernan Somerville* to said *Nelson*; and this note is a renewal in part of that \$1000 note, though dated 1 November, 1841; and that the other of said notes were passed to *Thomas Penny*.

The defendant proved that counsel for the garnishee appeared in the attachment suit by direction of *Charles Tiernan*, and the counsel proved he had no recollection of being informed by *Charles Tiernan* that he had passed away the notes; but that *Tiernan* set up the defence that the notes *were given* to him in a different character from that in which the attachment was levied.

To sustain the *second* ground of defence, the defendant offered the record containing the petition of said *C. T.*, and the schedule and other proceedings in insolvency, and proved "that the debt now sought to be recovered, was part of the debt stated in said schedule."

On this state of facts, the court below was asked to instruct the jury that if they should believe *Charles Tiernan*, at the time the attachment issued, and when he applied for the benefit of the insolvent laws, was the holder of the note sued on, then the plaintiff was not entitled to recover; and it is the duty of this court to determine whether that court was in error for refusing to give such instructions.

The questions then are broadly presented, whether an attachment laid in the hands of the maker of a promissory note as garnishee, for the debt of an endorsee, then being the owner and holder of the note, and a judgment of condemnation on the attachment, will protect the maker garnishee in a subsequent

action brought on the same note, by a subsequent endorsee receiving the note without notice. A preliminary proposition was argued by the appellee's counsel, which cannot be sustained, to wit: that there was no evidence which the jury could respect to prove the fact of the notes being in the hands of *Charles Tiernan* at the time of the attachment. It is emphatically stated, "the defendant proved the debt now sought to be recovered was part of the debt stated in said schedule" of *Charles Tiernan*, and the testimony of *Charles Tiernan* and *Mr. Bradford* would seem to establish that the note was originally taken by *Charles Tiernan* for himself or his firm. If in his possession at the moment it was made, and was found also in his possession 14th June, 1842, the date of his petition, more than six months after its date, being five months after the attachment, it would be not only sufficient to go to the jury, but appear to be conclusive in the absence of any clear and satisfactory account of the time and circumstances of its intermediate disposition, and this without reference to what has been proved by *Mr. Bradford*, as to his being engaged by *Charles Tiernan* to defend this suit of the attaching creditor, and the exclusive ground of resistance on which he relied.

The most alarming consequences to all commercial transactions, and all commercial men, have been presented in the most glowing terms, as the inevitable result of a decision by this court, that a negotiable instrument can be attached in the hands of the maker. In a case of first impression, depending on a statute, of which the language was capable of a construction, which might avoid embarrassment to the commercial or any other portion of the community, undoubtedly the argument of inconvenience would justly have controlling influence. But this is neither a case *primæ impressionis*, nor is the statute which governs it capable of a construction, such as is proposed. Its terms are, that a creditor in certain conditions may attach "the lands, tenements, goods, chattels and credits of his debtor." See act of 1796, ch. 56. And another part of the act speaks of the liability of a garnishee who "is *indebted* in *any* sum of money." It also requires the garnishee to answer upon oath



such interrogatories as may be propounded by the creditor, touching the particulars of his indebtedness, and on failure to answer, the court is to adjudge him indebted to an amount sufficient to pay the debt. And this was but a repetition in respect to the subject of the attachment of the act which had been in force since 1715, by which attachments were authorized against all goods, chattels and credits in the hands of any person whatsoever; yea, even in the plaintiff's own hand, "adding to goods, chattels and credits;" also "lands," which first by construction of the statute of 5 Geo. 2. ch. 7; and afterwards by our own legislation, had become liable to be seized, and sold by *fiery facias*, in the same manner as personal property. Certainly the Legislature of this State in 1795, when they deliberately re-enacted these provisions, and made them apply to cases not within the act of 1715, were not uninformed of the general principles of commercial law, which governed negotiable paper. The statute of 3 and 4 Anne, ch. 9, making promissory notes negotiable, was introduced at an any early period into the Colony: and in a very few years after its enactment, we have on our own statute book the legislation which was had to aid and promote the law-merchant in respect to protested bills of exchange. See act of 1715, ch. 7. It is happily true that the commercial operations of our citizens have been greatly enlarged since that period; but still, the attachment law has remained without repeal or restriction: on the contrary, many other later, and some very recent statutes have extended the application of this remedy, specially provided the form of proceeding, and defined the parties for and against whom, and the authority or tribunals by which it may be used. In addition to this, it is found that as long since as in 1804, it was expressly decided in the General Court, where all the distinguished members of the bar from all parts of the State assembled, that a creditor may attach a promissory note in the hands of the maker, whether before or after due, and arrest its negotiability. The decision thus made near half a century since, has been published in the reports of *Maryland* decisions since 1821. See 1 Har. & John. 536, *Stewart & West*. During this whole period, there is no

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one item of complaint evidenced in either the legislative or judicial history of the State, or indeed in any other department.

This apparently long settled opinion on the plain words of a statute would require the court to hesitate much before it would be resisted, even if all the consequential inconvenience were to result from adherence to the rule, and none from abandoning it. But such is not the case. The result of a contrary doctrine would illy harmonize with all the legislation which has designed to place every species of property at the control of an honest creditor. Would it be no matter of just complaint that a debtor shall avowedly have thousands distributed in the hands of persons of undoubted ability, in the immediate vicinity of the creditor, who yet is denied any legal means to procure any portion of these sums, because his debtor has his large means in the form of negotiable paper? Certainly such funds could not be reached by any process of execution, and except by attachment, *must* be unavailing to the creditor. Our whole system regulating the relation of debtor and creditor is designed to subject every dollar's worth of property, real, personal and mixed, to the just claims of a creditor, and to exempt the honest debtor who does surrender all such property from the grasp of a relentless creditor, who might desire to imprison his person, or weigh down his future energies by the impending burden of his debt. It is not peculiar to our own State that the rule is not universal, which gives to the *bona fide* endorsee of a promissory note or bill of exchange, without notice, entire exemption from all defences which might be used against parties to the note, or subsequent holders, with notice. The *English* statutes of usury and gaming show their opinion that other considerations are quite as deserving of notice as the inviolability of the rule of the law-merchant in this respect, and sufficiently important to the community to create certain exceptions to that rule. These exceptions arise under circumstances which are beyond the knowledge of the parties affected by them, and in no respect does the paper on its face indicate its liability to exception. It will not do to say remote parties may enquire of those immediately concerned in the paper at its inception.

That answer meets all the difficulty arising from the effect claimed for the attachment, precisely to the same extent as when the negotiability of the paper is arrested or destroyed by usury, gaming or any other cause. The facts are as open to inquiry in one case as in the other. Other States in the Union have found it very practicable to conduct their business operations with similar restrictions upon this commercial rule. We find that attachment process, or as it is termed in some of the States, "trustee process," has been adjudged available to secure the debt in the hands of the maker of the note as garnishee, and arrest the negotiability of the note.

The case of *Chase & Haughton*, 16 *Verm.* 594, is a strong case full to the point. That was a negotiable instrument due to a resident of *Massachusetts*, where, by the express terms of a statute, negotiable paper is secured against such process. But as the contract was made in *Vermont*, and on its face required to be also executed there, the court held the maker liable to the process, and before the maturity of the note, on the words of their statute, which declared persons having the "goods, effects or credits" of the debtors, liable. It would seem from *Kirby's Rep.* 149, *Coit & Bull*, that such had long been the law of *Connecticut*.

The same doctrine seems to prevail in *Georgia*, *Tennessee*, *Alabama* and *Missouri*. See 13 *Mas.* 153 *Hull and Blake*. 7 *Geiger*, 42. *Huff and Mills*, 6 *Alab. Rep.* 712. *Dorr and Dawson*, 3 *Miso. Rep.* 88. *Scott and Hill*.

It has been intimated that the statutes of these States, in terms, allow any equitable defence to be made against an endorsee, which could be made against the original party, the payee. But it must be seen, that this rather more strongly makes against the position we combat. The argument is, be it remembered, that the alarming consequences to the mercantile world must coerce us to construe our statute directly in violation of its plain language and its apparent design. Not an authority is produced for the appellee, in the shape of a decision or *dictum*.

The entire derangement of all transactions by the medium of

negotiable instruments, is involved, it is said, in allowing their negotiability to be arrested by setting up their defence against an endorsee, without notice. It is no consistent answer then, when it is said such a defence can be made in *Alabama*, and no such derangement has been experienced, to reply that there they allow not only this, but any other equitable defence. It is calculated to prove that commercial operations will progress with even greater impediments than those imposed by our attachment laws.

It cannot be required the payee should insist on the production of the note, that its future negotiation might be restrained. The most usual case of attachment is where the holder of the note, the party whose credit is attached, is beyond the jurisdiction of the court—out of the State—of course, making any attempt to coerce an order upon him impotent. It is not, however, to be lost sight of, that in this case, the question is not made in the progress of the attachment cause, but the court having competent jurisdiction, has, in opposition to the efforts of the party now appellant, recognized the right of the attaching creditor to recover, and he has recovered after every means of resistance. The appellant having been thus unwillingly coerced to pay the note once by the judgment of the court now, when sued for the same debt by a party claiming under the same individual, on whose account and as garnishee for whom she paid it before, is told that she must pay it again. To suffer such injustice under the sanction of judicial proceeding, would be more justly the subject of complaint, than the imputed derangement of mercantile securities. In *Massachusetts*, where, as before said, they forbid the attachment of negotiable instruments, they have yet decided that where a court of competent jurisdiction, even in another State, has condemned the debt in the hands of a garnishee, they must respect such decision and receive it as full defence to a subsequent action on the same instrument. 13 *Mass.* 153, *Hull and Blake*. Surely we should pay as much courtesy and respect to our own courts, as is due from those of different States to each other.

We think on each of the grounds discussed, the court below



was in error in deciding the defence not tenable upon the record in the attachment case, entertaining the opinion, as we do, that a promissory note or bill of exchange is a credit in the view of the attachment laws, and that the former judgment was by a court of competent jurisdiction on the same matter, and conclusive between the parties.

With regard to the other ground of defence, the insolvency of the holder of the note, and the legal transfer thereby of his title to his trustee, it is deemed unnecessary to enter upon an argument in detail.

The general views taken in the case of *Alexander vs. Ghiselin* at the present term, as to the construction of the insolvent laws, and the devolution upon the trustee of the title of the insolvent to every species of property, will leave no room to except negotiable instruments, except the considerations of inconvenience, which have already been fully discussed. It is our opinion that the insolvency of the holder of a note or bill of exchange passes the title thereto to his trustee, and disables the insolvent from conveying an interest in the bill or note, after the date of his personal discharge, even to an endorsee, without notice of his insolvency.

In this opinion we are pleased to find ourselves sustained by the high authority of *Chief Justice Parsons*, and the other Justices of the Supreme Court of *Massachusetts*, in the case of *Baker vs. Wheaton*, 5 *Mass. Rep.* 509. The Chief Justice says, "where the note is discharged by the insolvent laws of the State," (both parties there being citizens, and bound by the operation of those laws,) "the contract no longer exists, and a subsequent endorsement is void, because there is nothing to pass by the assignment."

If, therefore, the defence upon the former recovery had been out of the way, the insolvency of the holder of the note should have availed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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Larrabee vs. Talbott.—1847.

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**EPHRAIM LARRABEE vs. W. A. TALBOTT, P. T. OF CHARLES P. ROGERS AND GEORGE A. FRICK.—December, 1847.**

*D.*, a resident and citizen of *New York*, sold and delivered goods in that city to *R.*, a resident and citizen of *Maryland*, for which the latter on the 12th May, 1841, in fact, gave the former his note at six months, dated 6th November, 1840, due 9th May, 1841. On the back of that note was endorsed a receipt of the 12th May, 1841, of *L.* in *Maryland*, for merchandise to the value of \$535, and several promissory notes of third parties for \$538 80, from *R.* on account of the note at 6 months, which was delivered up to him. On the 12th May, *R.* was insolvent, which fact was known to *D.*, for whom *L.* acted as agent. In August following, *R.* applied for relief under the insolvent laws of *Maryland*. In an action of trover, brought by his permanent trustee against *L.*, to recover the value of the merchandise and notes which he received from *R.*

*Held :*

1. That the original contract between *D.* and *R.* was a *New York* contract, in legal contemplation to be performed there, and governed by the laws of that State.
2. That the note subsequently given by *R.* to *D.*, as evidence of his indebtedness, could not alter the locality of the original contract.
3. As that note was not paid, *D.* might have sued on the original contract.

Upon a contract made with a citizen of *Maryland*, out of this State, to be performed in another State, by a citizen of another State, a discharge, obtained under the insolvent laws of *Maryland*, cannot affect the right of the creditor to an absolute and unqualified judgment in the courts of this State, and to place his execution upon any property of the insolvent debtor, to be found undistributed in the hands of his permanent trustee, under our insolvent system.

The decisions of the Supreme Court of the *United States*, upon all questions of constitutional law, are to be received as conclusive.

The late bankrupt law of the *United States* was enacted on the 19th August, 1841. It expressly provided that it should take effect only from and after the 1st February, 1842. This is equivalent to declaring that it should have no effect until that day, and hence it did not suspend the operation of the State insolvent laws until that day.

**APPEAL from Baltimore County Court.**

This was an action of trover, brought on the 31st March, 1842, by the appellee against the appellant, for divers articles of merchandise and promissory notes, enumerated and described in the declaration. The defendant pleaded not guilty, on which issue was joined. The verdict was for the plaintiff.

At the trial of the cause, the plaintiff offered evidence to show that *Rogers & Frick* being citizens of *Baltimore*, applied for the benefit of the insolvent laws of *Maryland*, to the commissioners of insolvent debtors for the city and county of *Baltimore*, on the 30th August, 1841. That the plaintiff was appointed permanent trustee of said applicants on the 20th December, 1841, and filed his bond with approved security, for the faithful discharge of his duties as such; that on the 12th May, 1841, *Rogers & Frick* were co-partners under that name, were then insolvent, and that such insolvency was then known to *D. Berrien, Jr. & Co.*; that on said 12th May, 1841, *Rogers & Frick* were indebted to *D. Berrien, Jr. & Co.* in the sum of \$1071 73 in the promissory note hereinafter inserted, and gave the said *D. Berrien* the goods to the amount of \$535, and the bills receivable and promissory notes of debtors of said firm of *R. & F.* to the amount of \$538 80, being the goods and notes set forth in the declaration in this cause, in payment of the indebtedness of said *R. & F.* to *D. Berrien, Jr. & Co.*, and that said goods and notes came into the possession of the defendant, as the agent of the said *D. Berrien, Jr. & Co.*; that at the time of such payment, said *Rogers & Frick* intended to apply for the benefit of the insolvent laws of the State of *Maryland*.

The defendant, to maintain the issue on his part, offered evidence to show that said *Rogers & Frick* were not insolvent on the said 12th May, 1841, but then believed themselves able to pay all their debts; that they did not intend to take the benefit of the insolvent laws, nor did they suppose from the nature of their circumstances that they would have to do so, but expected fully to pay all their debts. And further offered evidence that *Rogers & Frick* on that day had ample means to pay their debts, without being compelled to take the benefit of the insolvent laws; that *D. Berrien, Jr.* was wholly unaware of the insolvent condition of *Rogers & Frick* on the 12th May, 1841, and for some time thereafter.

The plaintiff, further to maintain the issue on his part, gave in evidence by *J. P. Delacour*, that he, witness, was clerk of

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*R. & F.* from June, 1840, till they failed; that *D. Berrien, Jr.* came to *Baltimore* on or about the 12th May, 1841, who told witness that at the instance of *R. & F.* he had come on from *New York* to settle his account; that *Berrien* and *R. & F.* had a settlement, and that *Berrien* received goods and notes in satisfaction of the indebtedness of *R. & F.* The goods were packed up in six boxes, marked T, (diamond T) and were sent off on Monday morning early, succeeding the settlement. Witness looked at the books, and found they were charged to *E. Larrabee*. *Berrien* gave witness a list of the notes taken in part settlement of *R. & F.*'s indebtedness to *D. Berrien, Jr. & Co.*, and told witness the notes were at *Larrabee*'s, where the debtor's on the notes might find them; and asked witness to take any of said debtors he might see, to *Larrabee*. Witness took *Johnson*, one of the debtors, to *Larrabee*, who paid his note. Witness asked *Larrabee* if he would give witness a commission of two and a half per cent. to bring the debtors to him. *Larrabee* said he was but an agent for *Berrien*, and would write to *Berrien* to see if he would consent to the commission; that the notes taken by *Berrien* and left with *Larrabee* were of good men; that witness has never known of any dealings between *Rogers & Frick* and *Larrabee*, and does not know that *Rogers & Frick* were known to *Larrabee* at the time of the settlement with *Berrien*. Witness never saw *Larrabee* at the store of *Rogers & Frick*, and *Larrabee* always told witness he was but the agent of *D. Berrien, Jr. & Co.*

The plaintiff further gave in evidence the promissory note of *Rogers & Frick* in favor of *D. Berrien, Jr. & Co.*, with its endorsements.

*Baltimore*, Nov. 6th, 1840.

\$1071 70. Six months after date, we promise to pay to the order of *Messrs. D. Berrien, Jr. & Co.*, ten hundred and seventy-one dollars and seventy cents, value received.

No. Due 6—9.

*Rogers & Frick.*

On the back of which said note were the following endorsements, to wit:



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Pay to the order of *Mr. E. Larrabee.*

*D. Berrien, Jr. & Co.*

Baltimore, May 12th, 1841.

Received on the within note, bill of merchandise to the amount of five hundred and thirty-five dollars.

\$535 00.

*Eph'm Larrabee.*

Received the following notes to balance the amount of this note :

<i>Wolfenburger &amp; Kerr,</i>	.	.	.	.	.	\$207 43
<i>Wm. Johnson,</i>	.	.	.	.	.	63 82
<i>Eli Overdeen,</i>	.	.	.	.	.	51 62
<i>W. W. Wolfenburger,</i>	.	.	.	.	.	74 96
<i>Wilson &amp; Spier,</i>	.	.	.	.	.	124 82
<i>Jno. H. Grigg,</i>	.	.	.	.	.	16 15
						<hr/>
						\$538 80

May 12th, 1841.

*Eph'm Larrabee.*

The signatures to said note of the makers, endorser and of *Larrabee* being admitted to be genuine; and further gave in evidence that the receipt of *E. Larrabee* on said note was the receipt of the defendant, and was for the goods and notes given by *Rogers & Frick* in payment of their debt to *D. Berrien, Jr. & Company.*

The plaintiff further gave in evidence the plaintiff's demand of the defendant of the goods and promissory notes (mentioned in his declaration) given as payment by *R. & F.* to *D. Berrien, Jr.*, which demand was made on the 20th January, 1842, on the defendant, and by him refused.

The defendant, further to maintain the issue on his part, gave in evidence by *Joseph W. Larrabee*, that witness was clerk of defendant and is his brother, that he never knew of any business transactions with *R. & F.* by the defendant. That he was clerk on the 12th May, 1841, and that he never saw any goods come in the store of defendant from *Rogers & Frick*: that if any had come, witness would have known it, as it would have been his duty to have entered them in the receipt book.

Witness saw *Berrien* in defendant's store in May, 1841, when then in *Baltimore*; does not know of any boxes shipped to *New York* in May, 1841.

The defendant further gave in evidence by *John Brown*, a competent witness, that the witness is agent for the coasting transportation line between *Baltimore* and *New York*; that on the 14th May, 1841, *E. Larrabee* shipped in his line of packets to *New York*, six boxes of goods marked T, (diamond T,) to *A. Gilbert*; that these goods were received on board on the 14th May, 1841; that he does not personally know who shipped these goods, but that the bill of lading is in the name of *E. Larrabee*.

The defendant further gave in evidence by *Edward W. Larrabee*, that he remembers when *Berrien* was in *Baltimore* in May, 1841; that *Berrien* left for *Washington*, on the 12th or 13th of May of that year; and then returned to the city of *Baltimore*. That *Berrien* went to *Washington* within two days after reaching *Baltimore*; that on the 14th May, 1841, about 8 or 9 o'clock, A. M., a drayman stopped before the defendant's store door with some boxes of goods on his dray, and entering the defendant's store, said to witness, "here are some goods from *Rogers & Frick*, who have told me to call here for the bill of lading for the *New York* packets:" that witness then saw the defendant step back to the desk in the back of the store, and after a little time give the drayman a piece of paper, which the drayman took, and drove off with the goods.

Whereupon the plaintiff prayed the court to instruct the jury as follows:

1. If the jury shall find from the evidence, that at the time *Rogers & Frick* assigned and delivered the merchandise and notes in question to *Berrien* or *Larrabee*, they had no reasonable expectation of being exempted from liability or execution, for or on account of their debts, without applying for the benefit of the insolvent laws, then the said transfer was made with a view, or under an expectation on the part of *Rogers & Frick*, of being or becoming insolvent debtors, and said trans-

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fer is void ; and shall further believe, that *Rogers & Frick* did afterwards apply for the benefit of the insolvent laws of *Maryland*, the plaintiff is entitled to recover, provided the jury shall also believe that *Berrien* had notice of the condition of insolvency of said *Rogers & Frick*. Notwithstanding, they shall also believe that *Larrabee* acted as the agent of *Berrien*, in the receipt of the property, and had shipped the goods to *Gilbert* before the demand of the plaintiff.

2. Although the jury should believe that *Rogers & Frick* had reasonable expectations of being exempted from liability or execution for or on account of their debts at the time of the assignment and delivery as referred to in the first instruction, yet, if the jury find the said assignment and delivery, and that the same was made with a view of being or becoming insolvent debtors, and with intent thereby to give an undue and improper preference, and that they afterwards applied for the benefit of the insolvent laws, then said assignment is void, although the jury should believe that said assignment was made in satisfaction of a *bona fide* debt due from said *Rogers & Frick* ; and although the jury should find that *Berrien* had no notice of the condition of insolvency of said *Rogers & Frick*, if such insolvent condition existed at the time of said assignment ; and the plaintiff is entitled to recover, although the defendant acted as mere agent of *Berrien*, if the jury shall find that the defendant shipped the goods before action brought, to *Gilbert* of *New York*.

Which instructions, the court (ARCHER, C. J., and PURVIANCE, A. J.) gave. The defendants excepted and prosecuted this appeal.

It was admitted in the Court of Appeals, that it was proved by each party, at the trial of this case in the court below, that *D. Berrien Jr. & Co.* were citizens of the State of *New York*, residing in the city of *New York*, before any dealings between them and *Rogers, Frick & Co.*, and so continued till the trial of this cause ; and that the indebtedness of *Rogers & Frick* to said *D. Berrien, Jr. & Co.* was for goods sold and delivered by said *Berrien & Co.* at the city of *New York*, to said *Rogers & Frick*,

and for which indebtedness the promissory note set out in the bill of exceptions, was given by said *Rogers & Frick* to said *D. Berrien, Jr. & Co.*; that the said promissory note was given in *Baltimore*, on or about the 12th May, 1841, and after the 9th May, 1841; that the 9th May was the due day, by average, for the previous purchases of *Rogers & Frick*; that *Rogers & Frick* applied for the benefit of the insolvent law, and received their personal discharge on the 30th August, 1841; and the plaintiff was then appointed provisional trustee, and bonded as such. And it is agreed, that these facts shall be taken as part of the bills of exceptions.

It was also agreed, that the first three points of the appellant were raised by prayers offered, and refused on the trial below, which prayers were mislaid, and therefore, not inserted in the record. And that no objection shall be taken to said points, because of the non-appearance of said prayers in the record.

And it is further agreed, that no objection shall be taken to the prayers in the record, because of any informality or omission appearing on the face of such prayers.

That the fifth and sixth points be waived, and the seventh point be also waived, except so far as it raises the question whether the act of 1834, merges or repeals the sixth section of the act of 1816, ch. 221, and also the act of 1812, ch. 77, sec. 1.

It is further agreed, that if the court shall not reverse the judgment on any of the first three points, but shall be of opinion that in case there had been sufficient evidence given below, to prove that the goods shipped by the appellant to *Gilbert*, of *New York*, were so shipped by the order and direction of *Berrien & Co.*, and were in fact delivered to *Berrien & Co.* immediately thereafter; that such shipment and delivery discharged the defendant to that extent, and the plaintiff below, was not entitled to recover for such goods, that then the judgment shall be reversed, and judgment entered for the appellee, to the amount of six hundred and two dollars, with interest from the 30th September, 1843; and that the costs below, shall be paid by the appellant, and the costs in this court, by the appellee; the appellant reserving any right



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of appeal he may have to the Supreme Court of the *United States*.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By WM. H. NORRIS and REVERDY JOHNSON for the appellant, and

By TALBOTT and DOBBIN for the appellee.

MARTIN, J., delivered the opinion of this court.

By the sixth section of an act of Assembly of 1816, ch. 221, entitled an act relating to insolvent debtors in the city and county of *Baltimore*, it is enacted:—

“That all deeds, conveyances, transfers, assignments or sales of any property, real, personal or mixed, or of any debts, rights, or claims to any creditor or creditors, security or securities which have been or shall hereafter be made, by any person, with a view, or under an expectation of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference to such creditor or creditors, security or securities, shall be absolutely null and void, and the title to property or claims so attempted to be conveyed, transferred, assigned or sold, shall vest in the trustee or trustees of such insolvent debtor as effectually as any property specified in the schedule of such insolvent debtor.”

And by the first section of the act of 1834, ch. 293, entitled “a further supplement to the act relating to insolvent debtors in the city and county of *Baltimore*,” it is declared:

“That in all cases of applications hereafter to be made for the benefit of insolvent debtors under the act to which this is a supplement, all conveyances, assignments, sales, deliveries, payments, conversions or dispositions of property, &c. that shall be made or allowed to be made, whether upon request or otherwise, by any applicant with a view to the advantage or security of, and with intent to prefer any creditor or creditors, &c. of such applicant, when such applicant shall have no reasonable expectation of being exempted from liability

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or execution for or on account of his debts without applying for the benefit of the insolvent laws as aforesaid, shall be deemed within the meaning and effect of the sixth section of the act to which this is a supplement, to have been made with a view or under an expectation on the part of the applicant, of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference;" with a *proviso*, "that the provisions of this section of the act, shall not apply as against any person claiming by virtue of any assignment, &c., for valuable consideration, from or under the creditor or creditors, &c.; nor to any case where the said creditor, or security, shall appear not to have had notice of the condition of insolvency aforesaid, of said debtor."

It appears from the evidence in this case, as incorporated into the bill of exceptions, that *D. Berrien & Co.*, merchants, residing in the city of *New York*, sold and delivered at *New York* to *Rogers & Frick*, merchants, residing in the city of *Baltimore*, goods amounting to the sum of one thousand and seventy-one dollars and seventy three cents; that *D. Berrien, Jr.* visited *Baltimore* at the instance of *Rogers & Frick*, for the purpose of settling his account; that on the 12th May, 1841, the promissory note set out in the bill of exceptions was given by *Rogers & Frick* to *D. Berrien, Jr. & Co.*, on account of their said indebtedness to them, and that on the same day the merchandise, and promissory notes and bills receivable, mentioned in the declaration, were delivered by *Rogers & Frick* to *D. Berrien & Co.*, or to the defendant, as their agent, in payment of their promissory note; and that the note was cancelled and surrendered by *Berrien & Co.* into the possession of *Rogers & Frick*.

It further appears from the record, that *Rogers & Frick* applied for the benefit of the insolvent laws of *Maryland*, and obtained their personal discharge on the 30th August, 1841; and that the appellee was appointed their provisional trustee on the 30th August, and their permanent trustee on the 20th December, 1841.

It also appears from the bill of exceptions, that the plaintiff at the trial of the cause, introduced evidence to show that on

the 12th May, 1841, *Rogers & Frick* were actually insolvent, and that this condition of insolvency was known to *D. Berrien, Jr. & Co.*, and that *Rogers & Frick* intended at that time to apply for the benefit of the insolvent laws. And offered testimony to prove that the property mentioned in the declaration came into the possession of the defendant, as the agent of *D. Berrien, Jr. & Co.*, and that a demand was made by the plaintiff upon the defendant for the delivery of this property on the 20th January, 1842, and was by him refused.

With respect to this portion of the case, there was conflicting testimony offered by the defendant, with the exception of the demand and refusal: that was conceded, and in this condition of the cause, the plaintiff asked the court to give to the jury the following instructions:

1. If the jury shall find from the evidence, that at the time *Rogers & Frick* assigned and delivered the merchandise and notes in question to *Berrien* or *Larrabee*, they had no reasonable expectation of being exempted from liability or execution, for or on account of their debts, without applying for the benefit of the insolvent laws, then the said transfer was made with a view, or under an expectation on the part of *Rogers & Frick*, of being or becoming insolvent debtors, and said transfer is void; and shall further believe, that *Rogers & Frick* did afterwards apply for the benefit of the insolvent laws of the State of *Maryland*, the plaintiff is entitled to recover, provided the jury shall believe that *Berrien* had notice of the condition of insolvency of said *Rogers & Frick*. Notwithstanding, they shall also believe that *Larrabee* acted as the agent of *Berrien* in the receipt of the property, and had shipped the goods to *Gilbert*, before the demand of the plaintiff.

2. Although the jury should believe that *Rogers & Frick* had reasonable expectations of being exempted from liability or execution, for or on account of their debts, at the time of the assignment and delivery, as referred to in the first instruction, yet if the jury find the said assignment and delivery, and that the same was made with the view of being or becoming insolvent debtors, and with intent thereby to give an undue and

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improper preference, and that they afterwards applied for the benefit of the insolvent laws, that then said assignment is void, although the jury should believe that said assignment was made in satisfaction of a *bona fide* debt due from said *Rogers & Frick*, and although they should find that *Berrien* had no notice of the condition of insolvency of said *Rogers & Frick*, if such insolvent condition existed at the time of said assignment; and the plaintiff is entitled to recover, although the defendant acted as mere agent of *Berrien*, if the jury shall find that the defendant shipped the goods before action brought, to *Gilbert* of *New York*.

These prayers were granted by the court below, and exceptions having been taken to the ruling of the court, the question presented for our consideration is, whether they erred in the instructions which they appear to have given to the jury, with respect to the law of the case.

It is apparent from the statement we have given of this case, that the material and prominent question raised by the record, is that which respects the validity of the transfer of the 12th May, 1841.

And upon this point, the counsel for the appellant have contended, that as *Berrien & Co.* were citizens of *New York*, the insolvent laws of *Maryland* could not prevent *Rogers & Frick* from discharging their *bona fide* indebtedness to them by a delivery of the property mentioned in the declaration; and that as the contract by which they were so indebted to *Berrien & Co.* was made in *New York*, such insolvent laws could not prevent the debt being discharged, in the mode and manner stated in the bill of exceptions.

We did not understand the counsel for the appellee as controverting the proposition advanced by the counsel for the appellant, that the contract between *Berrien & Co.* and *Rogers & Frick* was to be considered as a *New York* contract. The goods were purchased by *Rogers & Frick* in *New York*, and there is no doubt that in legal contemplation, the contract was to be performed there, and to be governed by the laws of that State. The fact that a promissory note was subsequently



drawn at *Baltimore* by *Rogers & Frick*, in favor of *Berrien & Co.*, as evidence of their indebtedness, cannot be treated as altering the locality of the contract. The original cause of action is never considered as extinguished by the mere taking of the promissory note of the debtor, and therefore, if the note is not paid, and is surrendered, it has always been held, that an action may be maintained on the common courts for the sale and delivery of the goods.

We have then before us a contract made and to be performed in *New York*, between citizens of *Maryland* and citizens of *New York*, and it is now settled by the adjudications of the Supreme Court, that the discharge obtained by *Rogers & Frick* under the insolvent laws of *Maryland*, could not affect the right of *Berrien & Co.* to obtain against them in the *Maryland* courts, an absolute and unqualified judgment, and to place their execution upon any property of the insolvent debtors, to be found undistributed in the hands of their trustee.

In the case of *Cook vs. Moffat & Curtis*, 5 *How. Rep.* 295, it appeared that *Moffat & Curtis*, merchants of *New York*, sold goods to *Cook*, who was a merchant and resident of *Baltimore*; that on a settlement of their accounts, *Cook* transmitted his promissory notes to his attorney in *New York*, who delivered them to *Moffat & Curtis*, and that after the notes became due, *Cook* applied for and obtained the benefit of the insolvent laws of *Maryland*. An action was instituted against *Cook* in the Circuit Court for the District of *Maryland* on the common money courts. *Cook* pleaded his discharge under the *Maryland* insolvent laws, insisting that the contract was to be performed in *Maryland*, and governed by the laws of *Maryland* in existence at the time it was made, and that therefore his discharge under her laws was a good defence to the action.

The case was presented to the Circuit Court, upon an agreed statement of facts, and the court overruled the plea and gave an absolute judgment for the plaintiff. This judgment was affirmed by the Supreme Court at the January term, 1847. This case in its leading facts is strikingly similar to the one under consideration, and we refer to the opinion of the court, as con-

taining what must now be regarded as the final adjudication of the Supreme Court, upon a question, which has produced since it was first agitated, much conflict of opinion, and has given rise to many perplexing doubts.

*Mr. Justice Grier*, who delivered the opinion of the court, when speaking of the locality of the contract, at page 307 says—

“That the contract declared on in this case was to be performed in *Maryland*, and to be governed by her laws, is a position that cannot be successfully maintained, and was therefore very properly abandoned on the argument here. For although the notes purport to have been made in *Baltimore*, they were delivered in *New York*, in payment of goods purchased there, and of course, were payable there, and governed by the laws of that place.” He says—

“That the question to be decided is, whether the bankrupt law of *Maryland* can operate to discharge the plaintiff in error from a contract made by him in *New York*, with citizens of that State?” He controverts the proposition that the opinion in *Ogden vs. Saunders* is liable to the imputation of having established the doctrine, that a State court would be justifiable in giving effect to a bankrupt discharge, which the courts of the *United States* would declare invalid, and affirms that such a decision has never been made by this court. Upon this subject his language is—

“The Constitution of the *United States* is the supreme law of the land, and binds every forum, whether it derives its authority from a State, or from the *United States*. When this court has declared State legislation to be in conflict with the Constitution of the *United States*, and therefore void, the State tribunals are bound to conform to such decision. A bankrupt law which comes within this category, cannot be pleaded as a discharge, even in the forums of the State which enacted it.

“It is true, that as between the several States of this Union, their respective bankrupt laws, like those of foreign States, can have no effect in any forum beyond their respective limits, unless by comity. But it is not a necessary consequence, that State courts can treat this subject as if the States were wholly

foreign to each other, and inflict her bankrupt laws on contracts and persons not within their limits.” Again he says—

“Accordingly, we find that when in the case of *Sturgis vs. Crowninshield*, this court decided that a State has authority to pass a bankrupt law, provided there be no act of Congress in force to establish a uniform system of bankruptcy, it was nevertheless considered to be subject to the further condition, that such law should not impair the obligation of contracts within the meaning of the Constitution of the *United States*, art. 1, sec. 10. It followed as a corollary from this modification and restraint of the power of the State to pass such laws, that they could have no effect on contracts made before their enactment, or beyond their territory.”

We have quoted largely from the opinion of the learned Judge in this case, because it contains the views of a court whose decisions upon all questions of constitutional law, are to be received as conclusive; and it appears to us, that the principles enunciated in that opinion clearly establish, that the provisions of the insolvent laws relied on by the counsel for the appellee as invalidating this transfer, can have no effect upon the rights of these creditors. In other words, to use the language of the court, in *Cook vs. Moffat*, the State of *Maryland* has no constitutional power to inflict her insolvent laws on contracts and persons not within her limits.

The counsel for the appellee have however contended, that the provisions of the *Maryland* insolvent laws, as contained in the sixth section of the act of 1816, ch. 221, and the first section of the act of 1834, ch. 293, are not open to the constitutional objection that has been urged against them, because they leave unimpaired the obligations of this contract. But it is impossible to maintain this proposition. What is the obligation of the contract in the sense in which this term is used, in the eighth section of the first article of the Constitution of the *United States*?

This question is to be answered by referring to the exposition which has been given to this clause of the Constitution, by the Supreme Court.

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Larrabee vs. Talbott.—1847.

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In *Sturgis vs. Crowninshield*, 4 Wheat. 197, the court said—

“It would seem difficult to substitute words, which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.”

In *McCracken vs. Hayward*, 2 How. 612, Mr. Justice Baldwin said—

“In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding, by which it was to be carried into execution; annulling all State legislation which impairs its obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of the contract consists in its binding force on the party who makes it.”

Mr. Justice Story, in his Conflict of Laws, section 226, says:

“The obligation of a contract is the duty to perform it whatever may be its nature. It may be a moral obligation, or a legal obligation, or both. But when we speak of obligation generally, we mean legal obligation—that is, the right to performance, which the law confers on one party, and the corresponding duty of performance, to which it binds the other.”

What was the obligation of this contract? It was the duty imposed by law upon *Rogers & Frick* to pay *Berrien & Co.* for the merchandise they had purchased, in money, or in goods, if goods were accepted by the creditors as an equivalent for money. It was decided in *Gregory vs. Mack*, 3 Hill, N. Y. Rep. 384,—“That when the parties have agreed on a particular thing as a medium of payment, whether it be lands, goods



or labor, and the agreement has been carried into execution, it is the same thing in legal effect, as though the like sum had been paid in money." *Smith on Mercantile Law*, 530.

Now we find that *Rogers & Frick*, in fulfilment of this obligation, transferred to *Berrien & Co.* on the 12th of May, 1841, the property sought to be recovered, in payment of their indebtedment, and that it was so received and accepted by *Berrien & Co.* And can it be maintained, that a law which invalidates this transfer, annuls this payment, takes from the creditors the property which they had fairly acquired in the exercise of a right conferred upon them by the common law, and places it in the hands of the trustee, to be distributed exclusively among the domestic creditors of the insolvent debtors, unless the foreign creditors will take their dividend upon the humiliating condition of surrendering their acknowledged constitutional privilege to object to the insolvent's discharge,—is not a law impairing the obligation of the contract? We think not. A proposition of this kind cannot be maintained.

The true view of the case is, that the right of these creditors to obtain a preference over the other creditors of the insolvent, and the privilege of the debtors to give this preference, stands precisely as if these insolvent laws were not to be found among the statutes of the state. And under circumstances, no exception could be taken to the validity of this transfer. In the case of *Hickley vs. The Farmers & Merchants Bank*, 5 G. & John. 380, the Court of Appeals recognize the principle:—

"That by the common law, and apart from the provisions of the insolvent laws of this state, the debtor may secure one creditor to the exclusion of others, either by payment, or by a *bona fide* transfer of his property."

The late bankrupt law of the *United States* was passed on the 19th of August, 1841; but it was expressly provided by the seventeenth section of the statute, that it should take effect only from and after the first day of February, 1842. This is equivalent to declaring that the act should have no effect until that day; and therefore, there is no foundation for the point made by the counsel for the appellant: that the insolvent laws

of *Maryland* were suspended in their operation by the bankrupt act of the *United States*, at the period when the proceedings of *Rogers & Frick* under those laws were commenced, and consummated. At that time, the bankrupt act was not in force, and there could have been no conflict between the national and state legislation upon this subject.

In *Ex Parte, Eames*, 2 *Story Rep.* 325, *Mr. Justice Story* said:

“That as soon as the bankrupt act went into operation, in February, 1842, it *ipso facto* suspended all action on future cases, arising under the state insolvent laws, where the insolvent persons were within the purview of the Bankrupt Act. I say future cases, because very different considerations would or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the bankrupt act went into operation. It appears to me, that both systems cannot be in operation, or apply at the same time to the same persons; and where the state and national legislation, upon the same subject, and the same persons, come in conflict, the national laws must prevail, and suspend the operation of the state laws. This as far as I know has been the uniform doctrine maintained in all the courts of the *United States*.”

In the argument of this cause various other points were raised and discussed by the counsel, upon which it has become unnecessary to express an opinion, as the views we have taken of the insolvent laws of *Maryland* dispose of the whole case.

We think the court below erred in the instructions given by them to the jury, and that their judgment must be reversed.

JUDGMENT REVERSED.

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Crawford vs. Severson.—1847.

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WILLIAM CRAWFORD, JR. vs. SAMUEL, MARY AND CHARLES SEVERSON.—December, 1847.

The testator devised to his son *J.* his home plantation in fee, and to his son *S.* another plantation, in fee. To his daughter he devised \$1,000, of which \$600 was to be paid by *J.* and \$400 by *S.* at the expiration of three years from the testator's death, on his attaining full possession, which ever may last happen; with two years interest from *J.* and *S.* The rest and residue of his estate he devised absolutely to his two sons. *Held*, that the legacy to the daughter was a charge upon the land devised to the sons on the proportions of three-fifths and two fifths.

Such a bequest is not payable as legacies ordinarily are out of the personal estate, but is to be paid by the two sons, and *quoad hoc* the lands were held by them in trust.

If a testator direct a particular person to pay a legacy, in the absence of all other circumstances, he is presumed to intend him to pay it out of the funds with which he is intrusted.

Courts of equity have exclusive jurisdiction in all cases where the recovery of legacies is sought from lands charged with their payment.

In enforcing such liens, courts of equity, by analogy, generally adopt the statutory bar of twenty years, as a bar to relief, where the lien is of more than that standing, and where the plea of limitations or lapse of time is relied on in the defendant's answer.

The assignee of a legatee whose legacy was a lien or charge upon land, may enforce its payment by bill in equity against the owners of the land.

APPEAL from the Court of Chancery.

The bill was filed by the appellant on the 9th July, 1832, claiming payment of a legacy bequeathed in 1824, by *Thomas Severson* to his daughter *Sarah Denny*, as a charge upon and out of certain lands bequeathed to his two sons, *John* and *Samuel*, in fee. The appellant was the assignee of *Sarah*.

The opinion of this court sufficiently sets forth the allegations of the bill, answers and nature of the claim.

At March Term, 1825, the Chancellor (BLAND) being of opinion that the legacy claimed by the complainant had not been charged upon the real estate of the testator, dismissed the bill with costs. From that decree the complainant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

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Crawford vs. Severson.—1847.

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By J. MASON CAMPBELL for the appellant, and

By GROOME for the appellees.

DORSEY, J., delivered the opinion of this court.

The appellant's claim is for a legacy of one thousand dollars with the interest thereon, (to which he makes title as assignee,) bequeathed by *Thomas Severson* to his daughter *Sarah Denny*, by his will bearing date the 17th day of April, 1824, and admitted to probate on 13th day of April, 1825.

The only clauses in this will which are material to the issues in this cause are the six following, viz :

Item. I give and bequeath to my son, *John Severson*, all my home plantation whereon I now reside, except so much thereof as I may put to the plantation I purchased of *John Money*, by my altering the divisional fence between said plantation, which said divisional fence is to be taken for the division lines between said plantation to him in fee simple.

Item. I give and bequeath unto my son, *Samuel Severson*, all the plantation I purchased of *John Money*, and so much of my home plantation as I may put to said plantation by the alteration I may and do make in the divisional fence between the two plantations, which said divisional fence is to be the division line or lines between said plantations, to him in fee simple.

Item. I give and bequeath unto my daughter *Sarah*, wife of *John Denny*, one thousand dollars, to be paid to her in manner following,—six hundred dollars of which is to be paid by my son *John* at the expiration of three years after my death, with two years interest thereon, and the remaining four hundred dollars is to be paid by my son *Samuel* three years after my death, on his attaining full possession, which ever may last happen, with two years interest thereon.

Item. I devise and bequeath all the rest and residue of my estate, both real and personal, to be equally divided between my sons *John Severson* and *Samuel Severson*, their heirs and assigns forever, in equal proportion, share and share alike.

Item. It is my will and desire that my sons *John Severson*



and *Samuel Severson* shall have, receive, and inherit, and enjoy their bequest herein made to them, as they severally arrive to the age of eighteen years, or my death, which ever may last happen. And lastly, I do hereby constitute and appoint my brother, *John Wroth*, and my son, *John Severson*, executors of this, my last will and testament.

Between the three first and three last of the foregoing clauses in the testator's will there were many bequests, but they have no bearing or connection with the questions in controversy in this cause.

The assignments of the legacy being fully proved; the first and most important question which we are required to decide is whether the legacy given to *Sarah Denny* is a charge upon the lands devised to *John Severson* and *Samuel Severson*?

By the first and second devises made by the testator, he gave the lands to *John* and *Samuel* in fee; and by the immediately succeeding clause of his will he gave to his daughter, *Sarah Denny*, one thousand dollars, to be paid to her by his sons, *John* and *Samuel*, in the manner and in the portions therein specified, that is, *John* was to pay six hundred dollars and *Samuel* four hundred dollars.

By such a bequest, this legacy is not payable, as legacies ordinarily are, by the executors out of the personal estate of the deceased, but by the express mandate of the testator, is to be paid by his devisees, *John* and *Samuel*. Upon what ground could such a requisition be made of them? Upon no conceivable ground, but that the testator, in giving them his property, had prescribed the terms and conditions of his own munificence. Such is the inference of reason and of law; and as conclusively appearing by the acts of the testator, as if his intention had been declared in the most explicit terms. In consideration of the devises made to them by his will, he requires them to pay to their sister one thousand dollars, in the manner and upon the terms on which he directs it to be done. In what light does a court of equity regard such a proceeding? An answer to this question cannot be more satisfactorily given than in the language of some of the authorities on the subject.

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If a testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted. 2 *Story's Eq. sec.* 1247.

In 1 *Story's Rep.* 383, *Sands vs. Champlin*, Justice Story says that "a charge of debts upon a devisee in respect of lands devised to him, has always been held to be, not a mere charge upon the devisee personally, but, a charge on the lands." And on the same page in the same case he says: "such an order and direction is in the language of command, and imports a trust fixed upon the estate devised; for it is a charge in consideration of the devise; or in other words, it is a charge upon the estate in the hands of the devisee." And in page 384 of the same case, the learned Justice says: "indeed I understand it to be a general rule in the construction of clauses of this sort, that where the testator devises an estate to a person, and in respect thereof charges him with the payment of debts and legacies, the charges are always treated as charges in *rem*, as well as in *personam*, unless the testator uses some other language, which limits, restrains, or repels that construction." A similar principle to that asserted by this court in the case before us was decided by Lord Redesdale, in *Cary vs. Cary*, 2 *Sch. & Lef.* 188. And in an anonymous case in 2 *Freeman's Rep.* 192, it is said, "and if a man by his will deviseth his lands to *J. S.*, and doth desire that the said *J. S.* should pay his debts; or if it be the said *J. S.* paying his debts; or if immediately after the devise of his lands, he doth appoint or desire that his debts should be paid; or if he useth any expression in the will, whereby it appears that he had any intent to charge his lands with his debts, in such case his lands will be so charged."

It follows from the authorities referred to that the lands devised to *John* and *Samuel Severson* were charged with the payment of the legacy of one thousand dollars bequeathed to *Sarah Denny*; and that *quoad hoc* the lands were held by them in trust. Thus far this case has been considered apart from the devise of the rest and residue of the real and personal

estate of the testator to *John* and *Samuel Severson*. But that devise can have no effect in discharging the lands first devised to them, from the lien for the payment of the legacy.

Such a residuary devise might increase the amount of property subjected to the lien, but could not operate, as a discharge therefrom, of any part of it. It does not appear that any real estate passed by the residuary devise, nor that there are any specific articles of personal property which were embraced by it, that are now in the possession of any body, that a sale thereof might have been sought, together with the realty, by the bill before us.

The answer of the infant heirs of *John Severson* urges as a defence against the relief demanded by the appellant's bill of complaint, that *Thomas Severson* left a large personal estate much more than a sufficiency to pay all his debts and legacies, including that given to *Sarah Denny*, and that the persons entitled to her legacy having failed to enforce its payment against the executors of *Thomas Severson*, have no right to the remedy pursued in the bill before us. It has been before stated, that this legacy was not payable by the executors. And if it were necessary to add anything to prove that it was not the intention of the testator, that it should have been so paid, it is found in the fact, that had it been thus paid, *John* and *Samuel Severson*, being equally entitled to the residue of the personalty, each would in fact have paid the moiety of the legacy: whereas the mandate of the testator was that three-fifths of it were to be paid by *John Severson* and two-fifths by *Samuel*. There is no weight in the objection urged in behalf of the appellees, that the obligation imposed by the testator (in respect to *Sarah Denny's* legacy) on *John* and *Samuel Severson* was merely personal, and that the only remedy against them was by suit in a court of law. It is unnecessary to determine whether, under the circumstances and proofs in this case, an action at law could have been maintained against *John* and *Samuel Severson* on their personal liability to pay this legacy. Such a remedy, if it existed, could interpose no obstacle to the appellant's present proceeding in *rem*: courts of

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equity having exclusive jurisdiction in all cases where the recovery of legacies is sought from lands charged with their payment. And in determining on the validity and interpretation of legacies made a charge on lands, courts of equity are governed by the rules of the common law. The statute of limitations is relied on by the infant defendants; but it cannot avail them. In enforcing liens upon land, courts of equity, by analogy generally adopt the statutory bar of twenty years against a right of entry, as a bar to relief where the lien is of more than twenty years standing, and when the plea of limitations or lapse of time is relied on in the defendant's answer. But here no such defence can be interposed. The testator made his will in 1824, died in 1825, and the bill before us was filed in 1832: the lapse of time between the right to sue and the commencement of the suit, being only about seven years.

This court will sign a decree reversing, with costs, both in this court and in the court below, the Chancellor's decree dismissing the complainant's bill, and remanding the cause to the Court of Chancery, that a decree may be passed for the sale of the land, or so much thereof as may be necessary for that purpose, devised by *Thomas Severson* to *John Severson* and *Samuel Severson*, and charged with the payment of the legacy of one thousand dollars bequeathed to *Sarah Denny* in the manner specified in the last will and testament of the testator, deducting the two payments of one hundred and fifty dollars each, paid on account of that portion of the said legacy charged on the land devised to *John Severson*; and that such other and further proceedings may be had therein as the nature of the case may require.

DECREE REVERSED AND CAUSE REMANDED.



THOMAS C. WORTHINGTON AND ISAAC ANDERSON vs. MARY E. SHIPLEY.—December, 1847.

S. being indebted to W., in 1839, and not having paid that debt, in 1841, made a voluntary conveyance to his daughter of certain negro slaves. The consideration stated in the deed was love and affection, as well as money paid; but no money was in fact paid. There was no proof in the cause tending to prove an express delivery of the slaves, by the father to his daughter, at any time prior to the execution of the deed in 1841. In 1842, W. recovered judgment against S., and levied a *fiery facias* upon the slaves in question: and the daughter claiming as well by parol gift from her father as by his deed, sued out an injunction to prevent a sale. The answer impeached the deed of 1841, as made by an insolvent grantor, and as fraudulent and void. *Held*,

1. Under the act of 1763, ch. 13, the delivery of slaves, the subject of a parol gift, must be express, and made at the time of the gift.
2. That the title of the daughter, who claimed the injunction, depended entirely upon the deed of 1841.
3. Under the statute of 13 Eliz., ch. 5, an indebtedment by a grantor, at the time of the voluntary conveyance made, is *prima facie* only, and not conclusive evidence of a fraudulent purpose, with respect to a prior creditor.
4. This presumption may be repelled by showing that the grantor, or donor at the time of the gift, was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations; and that the settlement impeached was a reasonable provision for his child, according to his or her station and condition in life.
5. A voluntary conveyance, made by a donor loaded with debt, involved with embarrassments, approximating to insolvency, or the owner of an estate not adequate to the payment of the claims against him, is fraudulent and void, against a prior creditor seeking to impeach it.
6. The word "*voluntary*" is not to be found in the statute of 13 Eliz., ch. 5. Deeds founded upon a good consideration, if made *bona fide*, are expressly excepted from its operation. Its provisions are directed against transfers concocted in fraud, and fabricated and devised by the debtor, for the purpose of delaying and defrauding his creditor.

The case of *Reade vs. Livingston*, 3 John. C. R. 181, erroneous as to the exposition given to the statute, 13 Eliz., ch. 5.

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 28th September, 1842, by the appellee, and alleged, that on or about the 3d August, 1840, two negro girls, slaves for life, *Kitty & Nancy*, were conveyed to your oratrix by *James Shipley*, by a deed bearing date the day and year aforesaid, and duly acknow-

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ledged and recorded, a certified copy of which is herewith exhibited, that said negro girls have been seized and taken out of the possession of your oratrix by one *Isaac C. Anderson*, the sheriff of *Howard District*, by virtue of a supposed authority derived from a writ of *feri facias*, issued on or about the 23d September, 1842, upon a judgment rendered in the case of *Thomas C. Worthington*, administrator of *Charles G. Worthington* against *James Shipley*, by the court of *Howard District* of *Anne Arundel* county, at the March term, of said court, in the year 1841, that said writ of *feri facias*, issued against the property of *James Shipley*, the defendant in said case, and who is the same party, from whom your oratrix derived title to said girls as aforesaid, that the said plaintiff, *Thomas C. Worthington*, has directed the said sheriff, to seize and take said girls, under said writ of *feri facias*, that they were so seized, and taken on or about the twenty-fourth day of September, 1842, and that said sheriff is about to sell them, to satisfy the said judgment under the writ aforesaid, that said negro girls, became the property of the said *James Shipley*, who is the father of your oratrix, through his wife who is now dead, and who was the mother of your oratrix, that the said *S.* was induced to convey said girls to your oratrix, by the death-bed solicitations of her said mother, who requested said *S.* to give all the negroes, who came to him through her, upon her marriage to her several children in the manner then pointed out by her; that said *S.* gave said girls to your oratrix during the life time of his wife, and at her urgent solicitation, and that said deed was made in pursuance of said gift. And your oratrix avers and charges that said negroes never were the property of the said *James Shipley*, but were given to her mother during her life-time, and after her death to your oratrix, by her grandfather *Nehemiah Mosley*. That she apprehends that said girls may be placed beyond her reach and control, and that they are favorite negroes with your oratrix, both on account of the manner in which they became the property of your oratrix, and on account of their own good character, and to the end, that said two negroes may again be delivered up to your oratrix,

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that the said sheriff may be restrained from selling said negroes, or disposing of them beyond the reach of your oratrix, and for other and further relief. *Prayer* for subpoena and injunction, &c.

With this bill was exhibited the following bill of sale :

“Know all men by these presents, that I, *James Shipley*, of *Howard District*, &c. for the natural love and affection, which I entertain for my daughter *Mary Ellen Shipley*, in consideration of the sum of \$300 money to me in hand paid by the said *M. E. S.* of, &c., at and before the sealing and delivery of these presents, the receipt whereof, I, &c. have granted, bargained and sold, and by these presents, do grant, bargain, and sell, unto the said *M. E. S.* her &c., one negro woman, named *Catharine*, aged about twenty-five years, and one negro girl named *Nancy*, three years of age, to have and to hold, the said negroes above bargained and sold, or mentioned, and intended to be sold to the said *M. E. S.*, her &c., forever, &c. I, the said *J. S.* have put the said *M. E. S.* in full possession, by delivering to her, the said *M. E. S.* the above named negroes, at the sealing and delivery of these presents, in the name of the premises, hereby bargained and sold, or mentioned, and intended to be sold, unto her, the said *M. E. S.* In witness, whereof, I, the said *J. S.* have hereunto subscribed my name, and affixed my seal, this 3d of August, 1841.

Witness, JAMES MARTIN. JAMES SHIPLEY, [*Seal.*]

Recorded the 3d day of August, 1841—and duly certified.  
And the following judgment.

Court of *Howard District* of *Anne Arundel* county, March term, 1842.

THOMAS C. WORTHINGTON, adm'r, of }	March 14th, 1842,
CHARLES G. WORTHINGTON	} judgment by confes-
<i>vs.</i>	
JAMES SHIPLEY.	} sion for \$568 47 debt,
	} and \$1000 damages

and costs, damages to be released on payment of interest on debt, from 22d November 1839, and costs.

Test, JOHN L. MOORE, *Clerk.*

On the 28th September 1842, the Chancellor (BLAND)

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ordered subpœna and injunction as prayed, bond being filed and approved.

The answer of *Thomas C. Worthington*, administrator of *C. G. W.* denies that the negro girls, *Kitty* and *Nancy*, were conveyed to *M. E. S.*, by her father *J. S.* by deed bearing date the 3d August, 1840, but avers that the conveyance above referred to, was made on the 3d August, 1841. He admits that said negro girls, were seized and taken by the sheriff of *H. D.* by the direction of this respondent, under an execution or *fieri facias*, issued as alleged in the short copy filed with said bill. He admits that the negroes *Kitty* and *Nancy* aforesaid, are the children, or descendants of a negro woman who was given to the mother of the complainant, on or about the marriage of complainant's father and mother, by *Nehemiah Moxley, Junr.*, her grandfather, and that the title to said negroes was derived by complainant's father, by the gift aforesaid. This respondent does not know whether complainant's mother requested the said *James Shipley*, to give to her children all his negroes which came by her, but he denies that any gift was made of said negroes, *Kitty* and *Nancy*, to complainant in the life-time of her mother, or at any other time before the execution of the deed exhibited by complainant, and he denies also, that said negroes were given to complainant's mother during her life-time, and after her death, to the complainant, by the said *Nehemiah Moxley, Jr.*, but he avers that they were given absolutely to the wife of said *J. S.*, and thereby became his property. This respondent in his answer further states, that about the year 1840, the said *J. S.* became the collector of taxes for *Anne Arundel* county, in that part of said county, now known as *Howard District*, for the tax levied for the year 1839, and to be collected in the year 1840. That at this time the said *J. S.* was possessed of a life estate, in a farm which he derived through his wife, a farm in fee simple, containing about one hundred and eighty acres, and a brick house and lot in the village of *Ellicott's Mills*, together with the negroes gotten by his wife, and perhaps some few others, and a small amount of other personal property. That about this time, the said *J. S.* purchased



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a lot of ground in the village aforesaid, from a certain *Edwin P. Hayden*, and commenced the erection of a large stone edifice, which was in progression until the fall of 1841, when it was obliged to be abandoned for want of funds, after expending a large sum of money. That, when the time arrived for the settlement of the said *James Shipley* of the account as collector, as aforesaid, he was found greatly in arrears to the commissioners of *Anne Arundel* county, and unable to pay, and on the eighth day of September, 1841, suit was instituted on his bond in *Howard District* court, and judgment obtained against him, at March term, 1842, for the sum of \$4673 69 cents with interest. That, in the year 1841, being pressed by his creditors, for the settlement of their claims, and a little more than a month before the commencement of the suits of the commissioners of *A. A.* county, and this respondent, to wit: on the 2d August, 1841, the said *J. S.* executed a mortgage, to a certain *William H. Worthington*, for the farm of one hundred and eighty acres aforesaid, conditioned, to save him harmless from any loss he might sustain, as one of his securities on his bond, as collector of taxes as aforesaid, and on the same day, executed the deed to complainants, together with other deeds of a similar nature, conveying negroes to his children. That, on the 9th November 1841, the said *J. S.* mortgaged his brick house and lot aforesaid, in the village of *Ellicott's Mills*, to a certain *Thomas Lister*, for \$1200. This respondent further states, that he has been informed, and believes, that the said *J. S.*, was in the year 1840, and still is indebted to the estate of *Nehemiah Mozley, Senr.*, whose administrator he was in the amount of ten or twelve hundred dollars. That in the year 1840, or 1841, the said *James Shipley*, married for a second wife, a certain *Harriet Lindsay*, a woman of no fortune, and after having purchased, and paid for the lot, aforementioned, from the said *Edwin P. Hayden*, but before he had obtained a conveyance for the same, to wit: on the 14th March, 1842, the day of the rendition of the judgments in favor of the commissioners of *Anne Arundel* county, and of this respondent, the said *J. S.* procured a conveyance

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of the same, together with the building partially thereon erected, as aforesaid, to be made by the said *E. P. H.*, to the brother of the said *Harriet*, wife of said *J. S.*, for her separate use; that at the time of the execution of the deed aforesaid, to said complainant, of said negro girls, the said *James Shipley* had no other property, except that above described, and except a small amount of household stuff, and perhaps a negro man, or negro woman, this respondent does not know which, lived in the city of *Baltimore*. This respondent avers, that at the time of the conveyance of the said negroes, to the complainant, that the indebtedness of the said *James Shipley*, was such, that his whole property would not have discharged his liabilities. That the valuable consideration mentioned in said conveyance was false and fraudulent, as well as the same consideration mentioned in the other deeds, conveying to his children his other negroes, and conveying his house and lot in trust, for his wife, as aforesaid. This respondent further states, that in addition to the other conveyances, made by the said *J. S.*, in the year 1841, he sold and conveyed in the same year his life estate, in the farm aforesaid, which he acquired through his wife, to *Nehemiah Moxley, Junr.*, that the deed aforesaid, made by the said *J. S.*, to his daughter *M. E. S.*, was made with the view to defraud his creditors, and among the rest this respondent, and is void. That at the time the said negro girls, *Kitty* and *Nancy*, were taken by the sheriff of *Howard District* as aforesaid, they were the property of the said *J. S.*

With the answer was filed a short copy of the judgment of the commissioners of *Anne Arundel* county, of 14th March, 1842, by confession for \$4,673 69, &c., with interest from Oct., 1840.

The sheriff of *Anne Arundel* also answered the bill, but his answer is not material.

A commission to take proof was issued: the material parts of the proof taken are stated in the opinion of this court.

At September term, 1845, the Chancellor (*BLAND*) decreed the injunction to be perpetual, with costs. And the defendants appealed to this court.

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The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By T. S. ALEXANDER for the appellants, and

By E. HAMMOND for the appellee.

MARTIN, J., delivered the opinion of this court.

By the act of Assembly, of 1763, ch. 13, it is declared, that no negro or other slave, whereof the donor shall retain the use and possession, shall be transferred to any donee unless the gift be by writing, under the hand and seal of the donor, and acknowledged and recorded, as therein prescribed; with the *proviso*, that nothing contained in the act shall be construed to make void any parol gift of any negro or other slave, where there shall be an express delivery of such slave in pursuance of such gift, and where the sale, use and possession of the same shall be transferred to the donee.

In the case of *Coale* against *Harrington*, 7 H. & John. 156, the Court of Appeals held, that:

“By the act of 1763, ch. 13, a gift of negroes is only required to be by deed, acknowledged and recorded, where the donor retains possession; that solemnity not being authorized, or required by law, when the possession passes to the donee, by delivery, at the *time*, and in *pursuance of the gift*, an office copy in such case of a bill of sale, is not competent evidence to prove title in the donee.”

We have not been able to discover in this record any evidence even tending to prove that there was an express delivery of these slaves by *James Shipley* to his daughter at the time and in pursuance of the verbal gift alleged to have been made in the life-time of *Mrs. Shipley*; and we have referred to the act of 1763, and quoted the construction placed upon it, by the Court of Appeals, for the purpose of showing, that the parol gift asserted to have been made in this case, cannot be maintained; and that the title of the appellee to the slaves in controversy, must depend entirely upon the validity of the bill of sale of the 3d August, 1841.

It appears from the evidence in the cause, that this bill of sale was a voluntary conveyance of the two slaves mentioned in the proceedings by *James Shipley* to the appellee, who is his daughter. Although there is a monied consideration stated in the instrument, it is conceded that this was merely formal, and that the only consideration existing between the donor and donee, was that of love and affection. The debt of the appellant was created as early as the 22d November, 1839, and was therefore antecedent to the execution of the deed. And the question presented for our consideration, is, whether this conveyance is to be treated as fraudulent and void under the statute of 13 *Eliz.* ch. 5, with respect to this creditor upon the circumstances of the case as exhibited in the record.

It cannot be denied, that there has been some diversity of judicial opinion both in the English courts and in the tribunals of this country, with respect to the exposition of this statute, as applied to a voluntary conveyance from a father to his child, when attempted to be impeached by an antecedent creditor.

This subject was considered by the Supreme Court of *Connecticut*, in the case of *Salmon* against *Bennett*, decided in 1816, 1 *Connec.*: 525; and we refer to the opinion as enunciating, what we consider to be the true interpretation of the statute of 13 *Eliz.* ch. 5: a construction which is certainly in accordance with the doctrine upon this point, as it is now established, by an almost unbroken series of modern decisions in England, and in the United States.

At page 542—the court say :

“Fraudulent and voluntary conveyances are void as to creditors; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than



that intended to be remedied. Nor will all such conveyances be valid; for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved; for this would be impracticable in many instances, where the conveyance ought not to be established. It may be collected from the circumstances of the case. But in all cases, where such intent can be shown the conveyance would be void, whether the grantor was indebted or not. In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy, where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, and leaving ample funds unincumbered for the payment of the grantor's debts, then such conveyance will be valid against debts existing at the time. But though there be no fraudulent intent, yet if the grantor were considerably indebted and embarrassed at the time, and on the eve of bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors."

This question came before the Supreme Court, in *Hinde's Lessee against Longworth*, 11 *Wheat*. 213, in 1826. It was the case of a voluntary conveyance by a father to his son, and impeached by antecedent judgment creditors, as fraudulent under the statute of 13 *Eliz*. Upon this point, *Mr. Justice Thompson*, in delivering the opinion of the court, said:—

"A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount, would not make the deed

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fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side.”

The question with respect to the true construction of the statute of 13 *Eliz.* was considered by *Lord Langdale*, in 1840, as the master of the Rolls, in *Townsend* against *Westcott*, 2 *Beavan Rep.* 345. He said :

“ There has been a little exaggeration in the arguments on both sides as to the principle on which the Court acts in such cases as these : On the one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the Court to set aside a voluntary conveyance, and oblige the Court to do so under the statute of *Elizabeth*. I cannot think the real and just construction of the statute warrants that proposition, because there is scarcely any man who can avoid being in debt to some amount ; he may intend to pay every debt as soon as it is contracted, and constantly use his best endeavors, and have ample means to do so, and yet may be frequently, if not always indebted in some small sum ; there may be a withholding of claims, contrary to his intention, by which he is kept indebted in spite of himself ; it would be idle to allege this as the least foundation for assuming fraud, or any bad intention. On the other hand, it is said that something amounting to insolvency must be proved to set aside a voluntary conveyance ; this too is inconsistent with the principle of the act, and with the judgments of the most eminent judges.”

In the late case of *Gale* against *Williamson*, 8 *Mees. & Wels.* 409. The same doctrine was held in the *Exchequer*, by *Lord Abinger & Rolfe Baron*.

*Rolfe—B.* at page 410, says :

“ It is a mistake to suppose that the statute. (13 *Eliz.*) makes

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void as against creditors all voluntary deeds. All that it says, is, that a practice of making covinous and fraudulent deeds had prevailed, and, therefore, that all feoffments, gifts, &c., of any lands or goods, and chattels, as against the persons whose actions, debts, &c., by such covinous and fraudulent devices and practices shall be disturbed, hindered, delayed, or defrauded, shall be void. The Courts in construing the statute have held it to include deeds made without consideration, as being *prima facie* fraudulent; because necessarily tending to delay creditors. But the question in each case is, whether the deed is fraudulent or not; and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction."

The same proposition is declared by the *Lord Chancellor* and by *Eyre Baron*, in the case of *Jones vs. Boulter*, 1 *Cox Rep.* 288. 1 *Story Eq. Sec.* 364, (note) *Lord Chancellor B. Skinner* is reported to have used this language: "There is no mention in the act (*Stat. 13 Eliz.*) of voluntary conveyances; and the question has always been, whether in the transaction there has been fraud or covin. There were creditors at the time, and this is said always to have been a badge of fraud. It is true that this circumstance is always strong evidence of fraud. But if there be other circumstances in the case, that alone will not be sufficient." And *Lord Mansfield*, in *Cadogan vs. Kennett*, decided in 1776, *Comp.* 434, held:

"That a voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstances of a man being indebted at the time of his making a voluntary conveyance is an argument of fraud. The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors."

In considering this subject, it is to be remarked as already stated, that the word "*voluntary*" is not to be found in the statute. Deeds founded upon a good consideration, if made *bona fide*, are expressly excepted from its operation; and it is perfectly clear, from the preamble of the statute, that its provisions were pointed not at voluntary conveyances *as such*, but against transfers

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concocted in fraud, and fabricated and devised by the debtor for the purpose of delaying and defrauding his creditor.

Yet the construction put on the statute, by those who held that an indebtedness at the time of the conveyance conclusively fastens upon the instrument a fraudulent character, as an inference of law, practically and necessarily places voluntary conveyances and fraudulent conveyances, in the same predicament. Upon this construction, every voluntary conveyance must be a fraudulent conveyance with respect to the antecedent creditor.

A proposition of this kind cannot be maintained, and with great respect for the judgment of the eminent Judge, who delivered the opinion, in *Reade against Livingston*, 3 *John. Ch. Rep.* 481, we think, he erred in the exposition which he has given to the statute of 13 *Eliz.*

We therefore consider it as now established, at least by a decided preponderance of authority, and upon principles alone consistent with a just and rational interpretation of the statute, that an indebtedment at the time of the voluntary conveyance, is *prima facie* only, and not conclusive evidence of a fraudulent purpose, even with respect to a prior creditor; and that this presumption may be repelled by showing that the grantor or donor at the time of the gift was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations, and that the settlement upon the child was a reasonable provision, according to his or her station and condition in life.

Testing the voluntary conveyance in this case, by the rule thus announced, there can be no doubt that it must be pronounced fraudulent and void. The donor at the period of its execution was literally loaded with debt; was involved in embarrassments approximating to insolvency, and the owner of an estate, so far as it was unincumbered, certainly not adequate to the payment of the claims against him.

It is clear upon all the cases, that a voluntary conveyance made under such circumstances cannot be upheld against a prior creditor's seeking to impeach it.

As the appellee failed to establish a valid title to the slaves



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taken in execution at the instance of the appellant, the Chancellor erred, we think, in making the injunction perpetual.

A decree will be signed reversing the decree of the Chancellor, and dismissing the complainant's Bill.

DECREE REVERSED AND BILL DISMISSED.

ISAAC C. ANDERSON AND THOMAS C. WORTHINGTON vs.  
ALEXANDER HAMMOND.—*December, 1847.*

Under the provisions of the act of 1763, ch. 13, it is essential to the validity of a parol gift of a slave, that there should be an express delivery of the property at the time, and in pursuance, of the gift. The act is not gratified by a constructive delivery, nor by an actual and express delivery, if it does not accompany the gift.

APPEAL from the Court of Chancery.

This appeal which was argued for the appellant only, with the preceding one, was similar in its circumstances with that: The appellee married *Elizabeth Ann Shipley*, another daughter of *James Shipley*, to whom on the 3d August, 1841, he made another conveyance of a slave called *Miranda*. The appellee claimed also under a gift from *J. S.*, to his daughter made in 1835, at which time *S.* was not indebted.

The Chancellor (BLAND) also decreed a perpetual injunction in this cause, prohibiting the appellants as creditors of *J. S.*, from proceeding to recover their debt by *fi. fa.* levied upon the slave *Miranda*.

From that decree the defendant in Chancery appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER, and MARTIN, J.

By T. S. ALEXANDER, for the appellant.

No counsel appeared for the appellee.

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MARTIN J., delivered the opinion of this court.

With respect to the validity of the bill of sale of the 3d of August, 1841, this case cannot be distinguished from that of *Thomas C. Worthington and Isaac C. Anderson* against *Mary E. Shipley*, already determined. The voluntary conveyance of the 3d of August, 1841, must be held fraudulent and void under the statute of 13 *Eliz.* for the reasons assigned in the case to which we have referred.

In this case, however, the bill alleges, that *Miranda*, the slave in question, was verbally given, at the period of her birth, which was about the year 1835, by *James Shipley* to his daughter *Elizabeth*, who is the wife of the complainant. As at this time there was no indebtedment by *James Shipley* to the appellant, the gift is unaffected by the statute of 13 *Eliz.*

This averment in the bill is sustained, we think, by the evidence in the cause; and the title of the appellee to this slave turns upon the question, whether the verbal gift was perfected in the mode prescribed by the act of 1763, ch. 13.

Under the provisions of this act of Assembly it is essential to the validity of a parol gift of a slave, that there should be an express delivery of the property at the time, and in pursuance of the gift. The requirements of the statute are not gratified by a constructive delivery, nor by an actual and express delivery if it does not accompany the gift. The *factum* of the gift is, in this case, very clearly established; but the appellee has not succeeded in proving that express delivery of possession at the time of the gift, which is required by the act of 1763, ch. 13.

It follows from what we have said, that the appellee has shown no title to the slave in controversy, and that the Chancellor therefore erred in making the injunction perpetual.

DECREE REVERSED WITH COSTS AND BILL DISMISSED.

## HENRIETTA BENNETT AND OTHERS vs. JOHN BENNETT AND OTHERS.—*December, 1847.*

On the 7th January, the Chancellor made a final decree, which, at the same term, upon petition filed in February, he annulled, unless good cause be shown to the contrary, during the four first days of the next term. The parties who obtained the decree filed their answers showing cause, upon which, on the 8th November, 1845, the Chancellor dismissed the petition of February. The petitioners, on the 15th December, 1845, appealed both from the January and November decrees. *Held,*

That although the January decree bore date more than nine months before the appeal prayed, yet as while the decree was suspended, no right of appeal existed—the appeal in this case was in due time.

When a decree is suspended, by order of court, at the same term at which it was passed, the right to appeal commences after the suspending order is disposed of.

Proceedings to divide the real estate of an intestate, situated in two counties, are properly had under the descent act in the Court of Chancery. They should, however, in all respects, be in conformity to the provisions of the act of 1820, ch. 191.

The application may be made to the Court of Chancery either by bill or petition.

When the commissioners, in such a case, did not conform to the act of 1820—nor the commission require them to pursue the provisions of that act, it is ground of error.

### APPEAL from the Court of Chancery.

On the 22d July, 1841, *John Bennett, Thomas Hodges* and *Matilda Ann*, his wife, filed their bill against *H. W. Cooley* and *Edney W.*, his wife, of this State, and *John William, Matilda Ann*, and *Mary Elizabeth Rickets*, of the State of *Ohio*. The bill alleged, that *William Bennett* died seized of certain real estate in *Montgomery* and *Frederick* counties, in this State, leaving the complainants and defendants his heirs at law, the heirs in *Ohio* being infants. It alleged that the estate was susceptible of partition; and that if it could not be divided with advantage to all the parties, it might be sold, and proceeds distributed.

*Prayer* accordingly for *subpoena*, order of publication against the non-resident defendants, and for general relief.

Publication was ordered, as prayed, on the 22d July, 1841. The answer of *H. W. Cooley & wife* admitted the facts of the bill, and submitted to a decree.

In July, 1842, proof of the publication of the order of 22d July, 1841, was filed. And at December, 1842, the Chancellor (BLAND) ordered the bill to be taken *pro confesso* against the absent defendants; that there be a partition of the land of which *William Bennett* died seized, amongst the parties to the cause, so that *one-fourth* shall be allotted to the complainants, *John Bennett* and *Matilda Ann*, each—*one-fourth* to the defendant, *Edney W. Cooley*, and *one-fourth* to *J. W.*, *M. A.* and *M. E. R.*; a commission to five persons to make partition, and allot the same according to the decree, &c.

A commission issued on the 23d February, 1843, to five commissioners, and fully authorized and empowered them, or any three of them, to go to, enter upon, walk over, and survey the tracts or parcels of land in the proceedings in this cause mentioned; and to make out, or cause to be made out, a plat of the same, and to divide the same into four equal parts, having regard to quantity and quality—whereof one part is to be allotted to the complainant, *John Bennett*; one part, &c., one part to the defendant's minors, &c.; and to make out, or cause to be made out, a plat of the said lands, with a certificate of, &c., and return the same, &c.

And the five commissioners, on the 15th January, 1844, returned a survey and plat for 1352 acres of land. They allotted first, to *John William*, *Mary Elizabeth*, and *Matilda Ann Ricketts*, as and for their full proportion of said land, Lot No. 1, lying, &c., beginning, &c.

Secondly, to *Edney W. Cooley*. Lot No. 2.

Thirdly, to *Matilda Ann*, &c.

Fourthly, to *John H. Bennett*, &c.

Fifthly and lastly, to *Mrs. Henrietta Bennett*, the widow of *William Bennett*, as and for her full proportion of her right of dower in said real estate, the whole of Lot No. 1, first herein described, and assigned in this division of the said real estate to *J. W.*, *M. E.*, and *M. A. Ricketts*.



On the 7th January, 1845, the complainants and *H. Cooley & wife* filed their petition, waiving an error to their prejudice in the survey, and praying the ratification of the report and survey of the commissioners.

On the same day, the Chancellor (BLAND) ratified the report and survey, and decreed accordingly to the infant non-resident heirs the land partitioned to them, subject to the dower of *Henrietta Bennett*, widow aforesaid, and to the said widow, the same lands as and for her dower.

On the 17th February, 1845, the said *Henrietta Bennett* filed her petition, referring to the proceedings aforesaid, alleging that, in fact, the said infant heirs, who are entitled to *one-fourth* part of the deceased's estate, would derive no present interest therein; or that if they should be so entitled, the petitioner will get no dower right therein, under the said decree; the other divisions not being subject to any dower right, a result alike injurious to the petitioner and the said infants; that 155 acres of Lot No. 1 were not the property of the deceased; that he bought the same for one *S. H. Benton*, and never paid for the same, and never intended to pay for it; and that proceedings are now depending in equity to procure a title for the said *S. H. B.* that counsel was employed, on behalf of the petitioner, to represent the state of the title to the Chancellor; but that the same was neglected, and that she knew nothing of such neglect until the decree of confirmation and partition of the court was passed. *Prayer*, that the said decree may be set aside, and cause reheard, with liberty to produce further proof, that the interest of the infant children may be fully protected, &c.

On the 19th February, 1845, the Chancellor (BLAND) ordered that the decree of 7th January, 1845, "be, and the same is hereby set aside and annulled, unless good cause to the contrary be shown during the first four days of the next (March) term."

On the 10th March, 1845, the other parties filed their answer to the petition of the 17th February last, alleging, that *H. B.*, widow, had full knowledge of the proceedings of the com-

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missioners appointed to make partition, and should have shown cause before a final decree was passed in the premises; that the report of the commissioners will show that they have divided the said estate into *four equal parts*; having first ascertained the value of the same, taking into consideration the incumbrances thereon; that the lot assigned to the minor heirs was estimated subject to the incumbrance of the dower of the widow, as equal in value to the other lots, to which course, there is no legal or valid objection; that the life interest of the widow did not reduce the minors' lots below the value of the other lots. That 155 acres mentioned in the petition was purchased by *W. B.* a short time before his death; that he gave his bonds for the same, and paid a considerable part of the purchase money; that no proceedings are pending in equity in relation to said land, &c.

On the 8th November, 1845, the Chancellor dismissed the petition of the 17th February, 1842, with costs: and on the 15th December, 1845, *Henrietta Bennett* and the infant children appealed from the decree of 7th January, and order of 8th November, 1845.

This cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By N. BREWER, OF JOHN, for the appellants, and

By R. J. BOWIE for the appellees.

MAGRUDER, J., delivered the opinion of this court.

To the appeal which was taken in this case it is objected that it was not prayed in time.

The decree certainly bears date more than nine months before the appeal was prayed. But it appears that before the expiration of the term during which it was passed, the Chancellor passed an order thereby directing that the decree be set aside and annulled, unless cause to the contrary be shown during the first four days of the succeeding term. Afterwards he dismissed the petition, which induced a suspension of the

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decree, and on the same day the appeal was entered. While the decree was suspended by the Chancellor's order, the right of appeal did not exist. The appeal then was taken within nine months, after the right is to be considered as having commenced.

This is an application to divide the estate of an intestate, who died seized of lands situated in *Montgomery* and *Frederick* counties, it being alleged that some of the heirs were infants. As the real estate to be divided is situated in different counties our act of descents authorizes an application to be made to the Court of Chancery. But whether a case of this description be in Chancery or a county court, the proceedings must in all respects be in conformity to the provisions of the act of 1820, ch. 191, and because the proceedings in this case are not in conformity to the provisions of that law, the decree must be reversed.

The application to the Court of Chancery may be made by bill as well as by petition. *Chaney and wife against Tipton and others*, 11 *G. & J.* 255. But the proceedings in the case, are to be regulated by our law of descents. The commission which is to issue, must prescribe the same duties, give to the commissioners the same powers, and require of them the same return. The rights of the heirs must be the same in Chancery, that they are when the application is made to the county court. In this case the commissioners did not conform to the act of 1820, nor indeed did the commission under which they were acting require them to pursue the directions of that act.

DECREE REVERSED WITH COSTS AND CASE REMANDED.

Before a decree, *pro confesso*, is obtained upon an order of publication, citing a non-resident defendant, there should be proof of the fact of such non-residence. (*Rep'r.*)

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ELIZABETH BAYNARD vs. WILLIAM NORRIS AND MARY ANN, HIS WIFE, RACHEL HEIDE, J. P. JONES AND J. MORRIS.—December, 1847.

A testator directed, that out of a certain portion of his real estate absolutely devised to his three children, his widow's life estate of one-third of his whole property should be allotted by certain commissioners, to be appointed by the Orphans court, and the other portion so devised to be divided among said children. The commissioners intending, under their apportionment, to carry into effect the directions and wishes of the widow and children, erroneously and contrary to such directions and wishes, made one lot subject to the widow's life estate, and assigned a lot intended by the parties, for one, to another of the devisees. *Held*, that the Court of Chancery might correct the error, reform the award, and make it conform to the directions of the parties, the tenants for life, and in remainder in fee; and, also, decree that the parties should account for rent and profits received under the erroneous award.

The widow and one of the children claiming under the erroneous award, according to its description of the property, mortgaged the same to third parties, while in fact, the children and widow were in possession and enjoyment, according to their actual understanding, and not according to the award. The mortgagees claimed the property as *bona fide* purchasers, but omitted to state in their answer that their grantor or mortgagor was at the time of the conveyance, seized or pretended to be seized, and was possessed of the mortgaged estate. *Held*, that the mortgage constituted no objection to reforming the award of the commissioners.

The fact of the possession of a party, whose rights are involved in a purchase, is a sufficient intimation of those rights, to put the purchaser upon an inquiry into their nature, and failing to make it, he is in equity visited with all the consequences of the knowledge of the title.

Where a testator devises a certain portion of his real estate to his daughters absolutely, with provision for the appointment of commissioners to divide the same among them by the allotment of such commissioners, the legatees take legal estates, under and by virtue of the testator's will, in the portions of the realty, severally, and to them respectively assigned; their title is not created by the allotment.

APPEAL from the Equity side of *Baltimore County Court*.

The will of *George Heide* devised to his wife *Rachel*, one equal third part of

“My real estate, for and during the term of her natural life, to be *laid off and fixed in that part of my real estate, devised absolutely* to my residuary legatees, by three judicious men, to



be appointed by the Orphans court of *Baltimore* county, or the same may be made up in whole or in part of the annuities or yearly ground rents owned by me.

“All the rest, residue and remainder of my estate, real, personal and mixed, I give and devise as follows :

“The dwelling-house and warehouse and lots of ground on *Cheapside*, in the city of *Baltimore* ; the lot of ground and premises on the south side of *Baltimore* street, between *Paca* and *Green* streets, and extending to *German* street ; the lot of ground and premises purchased of *Samuel Chase* ; all my annuities or yearly ground rents, with the fee and reversion of and in the ground from which they arise, &c. &c., shall be allotted to and equally divided among my three daughters, *Eliza Baynard*, *Caroline Ferguson* and *Mary Ann Norris*, in manner and by the persons hereinafter directed, to hold absolutely as tenants in common, without any limitation or restriction, in part and on account nevertheless of their shares of the whole residue of my estate.”

The general residue of his estate the testator devised in trust for his three daughters, to be allotted by the five persons who might be appointed as aforesaid. The award of any three, &c., to be final and conclusive.

The five commissioners allotted to *Eliza Baynard*, among other matters :

“All that lot of ground and appurtenances conveyed by *James Hutchings* to the aforesaid *George Heide*, by deed dated 2d August 1792, and recorded, &c., valued at \$1,400, marked C.”

To *Mary Ann Norris* they allotted all the estate of which *George Heide* died seized and possessed of, under a certain deed from *Benjamin Griffith* to him dated 9th February, 1792, marked B., to commence upon the death of *Rachel Heide*.

And a certain other deed from *Richard Jones* to the said *G. H.*, dated 21st January, 1805, marked A., to commence upon the death of *Rachel Heide*.

The three commissioners appointed to allot *Rachel Heide* her life estate, allotted her the two lots conveyed by *Griffith* and *Jones*, B and C, with other property.

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The three lots were comprised within the description of *lots on Cheapside*.

The bill of the appellant, *E. B.*, alleged that *G. H.* was seized and possessed among other lots, of three lots in the city of *Baltimore*, described in an exhibit filed with the bill, as *A*, *B* and *C*; that lot *A* he acquired from *Richard Jones* on 21st January, 1805; lot *B* from *Benjamin Griffith*, and lot *C* from *James Hutchings*, and that he devised the same according to his aforesaid will; that the Orphans court, on the petition of *R. H.*, on the 22d February, 1831, appointed three commissioners, &c. to lay off one-third of the real estate of the said *G. H.* to the said *R. H.*, who returned their assignment on the 11th March, 1831; that they appraised lot *A* at \$1,800, and lot *B* and *C* at \$3,000, but they erroneously designated said lots, to wit: lot *A* as that conveyed to said *G. H.* by *James Hutchings*, and lots *B* and *C* as lots conveyed by *Benjamin Griffith* and *Rachel Jones*; that the said commissioners erroneously assigned to said *R. H.* the lots *A* and *B*, but intended to assign, *as the parties interested desired*, to said *R. H.*, the lots *B* and *C* as one lot, and did not intend to assign her the lots *B* and *A*, as by mistake has been done; that said *R. H.* since said assignment has hitherto been in possession of the houses and lots *B* and *C*, and collected the rents due therefor.

The bill further alleged, that upon the petition of the appellant and her sisters, *Caroline* and *Mary Ann*, and their husbands, the Orphans Court appointed five commissioners to allot the said estate to the three residuary legatees; that the said commissioners intended to allot the said thirds *in such manner as the parties in interest desired*; that the said *E. B.* was unwilling to take lot *A* at \$1,800, *the valuation of the three commissioners aforesaid*, who laid off the dower of *R. H.* and refused to take it in her third at said appraisement; that the said five commissioners, *intending to conform as far as possible to the views of the parties*, proceeded to make their appraisement and allotment, and did thereby intend to assign, *as the parties interested desired*, the lot *A* to the said *E. B.*, and the lots *B* and *C*

to *Mary Ann Norris* as one lot, and did not intend to assign to *M. A. N.* the lots A and B, as has erroneously been done; that the said *E. B.* since said assignment, hitherto has been in possession of lot A, and collected the rents thereof.

The bill further alleged that *W. Norris, Jr.* and *M. A. N.* his wife, to secure the loan of \$6,000 to *R. H.*, executed on the 29 June, 1832, a mortgage of the estate *devised, and allotted* to said *M. A. N.*, by the said five commissioners, and in said mortgage said lots B and C are erroneously mentioned as they are in said allotment, as the lots conveyed by G. and J. to *G. H.*, and are in said mortgage described as being occupied by one tenement; that on the 16 June, 1842, the said *Norris* and wife, and *Rachel Heide*, executed a mortgage to *Jacob Paul Jones* and *Israel Morris*, purporting to convey such parts of the property allotted by said *five commissioners* to said *M. A. N.* in reversion, and said *R. H.* for life, as are in said mortgage mentioned; that the said *R. H.* united in said mortgage voluntarily for the purpose of pledging her life estate, and all her other estate and interest in the property described in said mortgage to secure the said debt to *J. P. J.* and *J. M.* That the aforesaid alleged error of description, applies also to the said mortgage; that the said mortgage debt not being paid, the mortgagees obtained a decree for the sale of the property therein described; that on the 27 March, 1844, the said *J. P. J.* purchased the lots under said decree, and at which said sale, *notice of the claim of the said E. B. was publicly given*; that the said *Jones, Morris, Norris* and wife, and *Rachel Heide*, all knew it was the purpose of the said dower commissioners, and of the said five commissioners to assign said lot A to the said *E. B.*, and that the said *E. B.* was put in possession thereof when said allotment was made, and that she continued in possession thereof at the time of executing said mortgage as before. *Prayer* that the errors aforesaid may be corrected, that the said mortgage may be declared as of no effect as to lot A, that the legal title thereto may be conveyed to her by a trustee of this court, and for further and other relief, &c.

The answer of *Rachel Heide*, neither admitted nor denied

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the bill; but submitted to such decree as might be passed in the premises.

The answer of *Morris vs. Jones* admitted the seizin, will, death, and sources of the title, of *G. H.* It also admitted the proceedings in the Orphans court of *Baltimore* county as they there appeared; that they have no knowledge of any error or mistake therein, or either of them; but on the contrary, are informed that although said proceedings took place in 1831, yet it does not appear that any such error or mistake, was ever suggested to said court, or that any measures were ever taken to correct said alleged error; that in the year 1842, it was proposed to give these defendants, a mortgage on certain property situate in the city of *Baltimore*, represented to belong to the said *R. H.*, and *M. A. N.*, and *W. N.*; that these defendants being then and still residents of *Philadelphia*, knowing nothing of said property employed conveyancers to examine the title to all the lots composing the property so proposed to be mortgaged to them; that on examination, it was reported to them as satisfactory and good, and in consequence thereof, the defendants agreed to accept said mortgage, and in pursuance thereof, said mortgage was drawn; that these defendants acting in perfectly good faith without any suspicion or intimation that the complainant had any pretence of claim on any of said lots and property, accepted the same and complied with all the terms and conditions to be performed on their part as set forth in said mortgage. These defendants agreed to accept said mortgage, and enter into the contract therein set forth on the faith, and under the belief, that the grantors therein had a good title and right to convey the several lots aforesaid. The answer denied notice of the alleged mistake previous to or at the time the mortgage was taken; or that *Eliza Baynard* had possession of the lot conveyed by *Richard Jones* to *G. H.*, or received the rents as charged in his bill; that they never heard of any objection to said mortgage, until the autumn of 1843, long after said mortgage was forfeited; that the defendants gave value for said mortgage as therein alleged; that they are purchasers of said conveyed lot by *Richard Jones* to *G. H.*, as



aforesaid for valuable consideration *bona fide*, and without notice of any right or claim of said complainant or any one else in said lot, except the grantors in said mortgage, who thereby conveyed all their right. The answer then admitted the filing of their bill under said mortgage; the decree for a sale; that at the sale under such decree, it is true that the complainant gave notice of her claim to said lot conveyed by *R. J.* to *G. H.*; that *J. P. J.* became the purchaser thereof, being the highest bidder therefor for account of himself and partner *J. M.*, and after ratification paid the purchase money, and the trustee conveyed to them; that there is still a large balance due them.

By the exhibit filed with the answer furnished by the defendants' conveyancer, on 21st June, 1842, it appeared that lot A fronted on *Exchange Place*, and B and C on *Cheapside*.

The defendants, *Norris* and wife, did not answer the bill. There was a decree *pro confesso* against them as non-residents.

There was proof that the legatees agreed among themselves upon a division of the residuary estate. They were three daughters of *G. H.*; the whole residuum was easily divided by the residuary legatees, until they came to lot A, or complainant's exhibit No. 1; *G. H.* had estimated said lot A at \$1,800. The choice to take or reject that lot was between *Mrs. B.* and *Mrs. Ferguson*. The choice fell to *Mrs. F.*, and *Mrs. B.* finding she had to take lot A, objected to the valuation. The legatees agreed the valuation should be reduced before the award was made. The commissioners were only called on, so far as the division went, to say what lot A should be valued at, compared with the other property. Lot A was known among the residuary legatees. *Mrs. B.* agreed to take it upon condition, that it was reduced in value, and it was then awarded to her. The whole residuum was divided by the residuary legatees, and it was understood the commissioners were to follow the division made by them. The lot on *Market* and *German* streets, and lot A were the last to be divided. *Mrs. B.* was put in possession of lot A, has so continued ever since, and has drawn the rents.

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The deeds from *Richard Jones*, *Benjamin Griffith*, and *James Hutchings* to *George Heide*, were also proven, and showed the errors of the commissioners in their reference to such deeds, in relation to the lots A and C. The mortgages from *Norris* and wife to *R. H.*, and from both to *Morris* and *Jones*, were also in proof.

At February term, 1846, *Baltimore* county court (*LEGRAND*, A. J.) delivered the following opinion:

It appears from the proceedings in this cause, that a certain *George Heide*, now deceased, being seized in fee of several lots of ground in the city of *Baltimore*, made his last will and testament on the 14th March, 1829, which said last will and testament was never revoked, but admitted to probate after the death of said *Heide*; that by said will, (after making certain appropriations of a portion of his estate,) he provided for the distribution of the residuum of it among his children, according to the award of five commissioners: the clause in the will having relation to this subject, being in these words:

“I do hereby order and direct that the same shall be done by *five* persons, who shall be disinterested, and of respectable standing, to be appointed by the Orphans court of *Baltimore* county, or any other court of record in the State of *Maryland*, of which appointment my executors, *Zebulon Cooch* and *Alexander Fridge*, if living, shall be two. And the award, decision or allotment of any *three* of them shall, when made, be returned to and recorded among the records of the Orphans court aforesaid, or among the records of *Baltimore* county court, and shall be final and conclusive, on all and each of my residuary devisees, and each of their legal representatives.”

That on the petition of the heirs of *Heide*, the Orphans court appointed the commissioners, who, on the 9th June, 1831, made return of their appointment and allotment, which was recorded among the records both of the *Orphans court* and of *Baltimore* county court; that according to such appointment and allotment, *Mary Ann Norris*, (one of the children of *Heide*) had allotted and appointed to her, *two* lots of ground on *Cheapside*; one of which the aforesaid *Heide* obtained,

by deed dated 21st January, 1805, from a certain *R. Jones*; and the other by deed dated 9th February, 1792, from a certain *B. Griffith*; that the complainant had allotted and appointed to her a lot of ground, fronting on *Franklin* lane, and running back to the lot of ground mentioned in the deed from *Griffith* to *Heide*, already referred to; that the said *Mary Ann Norris* and her husband, subsequently, on the 29th June, 1832, mortgaged the two lots of ground which had been apportioned to the said *Mary*, to *Rachel Heide*, to secure the payment of \$6,000; that afterwards, on the 16th June, 1842, the said *Mary* and her husband mortgaged the same lots of ground to secure the payment of a debt due to *Israel Norris* and *Jacob Paul Jones* of *Pennsylvania*; *Rachel Heide* united in said instrument for the purpose of releasing any claim as dowress she might have on said property, in favor of the mortgagees; that the debt due *Messrs. Morris* and *Jones* not being paid, the mortgage was foreclosed, and a decree passed by this court for its sale on the 27th March, 1844; that at said sale, *Jacob Paul Jones* became the purchaser of two lots, which sale was reported to this court and finally ratified.

The bill alleges, that in the allotment to *Mary Ann Norris*, by the commissioners of the lot mentioned in the deed of *Jones* to *Heide*, a mistake was committed; that instead of this lot, the one mentioned in the deed from *Hutchings* to *Heide*, should have been allotted to her; and that it was the intention of the commissioners to have done so, and their belief at the time of the apportionment that such was done; that the lot mentioned in the deed from *Jones* should have been allotted to the complainant, and that the commissioners intended to have done so; that the said complainant, believing that the last mentioned lot had been apportioned to her, received the rents and profits of the same; that at the time of the sale, her counsel gave notice of her claim to said property.

The defendants, *Morris* and *Jones*, admit the notice given at the time of sale, of complainant's claim to the lot mentioned in the deed from *Jones* to *Heide*, but deny they had any notice of such claim until long after the execution of the mortgage to

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them by *Mary Ann Norris* and her husband; that the proceeds of the sale are wholly inadequate to pay the debt intended to be secured by the mortgage, and that there remains still a considerable sum due to the said *Morris* and *Jones*.

From the testimony of *Thomas Ferguson* it appears, that it was intended by the devisees, that the particular lot in question should have been allotted to the complainant, instead of to *Mrs. Norris*; and by the testimony of *Z. H. Cooch* and *Joseph Wilkins*, that there were conversations had on the subject, as to the complainant taking the lot at a less valuation than that which had been made by *Mr. Heide* in his lifetime, &c. &c.

On this state of facts, the complainant asks that this court by its decree, shall empower some trustee to convey to her the lot in question, and by the same decree to declare the mortgage executed by *Mary Ann Norris* and her husband, void and of no effect, so far as this particular lot is concerned.

Admitting that there are circumstances in the cause, which show it to have been the intention of the devisees of *George Heide*, and of the commissioners appointed in pursuance of the authority to that effect contained in his will, to have had the lot in controversy allotted to complainant, instead of to *Mrs. Norris*, the question is, how does this state of the case affect the defendants, *Morris* and *Jones*?

They were non-residents of *Maryland* at the time, and have been ever since the execution of the mortgage to them. When they agreed to receive the mortgage, they applied to an experienced conveyancer, *Mr. Spurrier*, to have the proper examination made; which, as *Mr. Nelson Spurrier* swears, was done to the best of the ability of the firm of which he was one.

*Mr. Heide* by his will had provided that the award and allotment of the commissioners, or that of any three of them, should "be final and conclusive, on all and each of my (his) residuary devisees, and each of their legal representatives." The award and allotment of the commissioners was made and returned for record on the 9th June, 1831. The mortgage from *Mary Ann Norris* and her husband, bears date 16th June, 1842, nearly eleven years after. During the whole of the intermediate



time, the records both of the Orphans court, and of the clerks of *Baltimore* county court, shew the title of the lot to be in the mortgagor, *Mrs. Norris*.

During the whole of this time, no steps were taken to have corrected any error which may have existed; but the records were there left to evidence to the world, that the commissioners having discharged the duty assigned to them, the parties interested were content with the manner in which it had been performed. With this evidence of the title being in the grantors, the defendants, *Morris* and *Jones*, accepted of the mortgage to them; without notice of any kind, as they declare in their answer, of the claim of the complainant, with the assurance of *Mr. Spurrier*, that the title was all right. Now the question is, how are these defendants situated? What is their position in the eye of a court of equity?

After a thorough examination of the leading cases on the subject, *Mr. Justice Story*, in 1 *Equity Jurisprudence*, sec. 109, thus announces the general principle by which cases of accident are governed:

“Perhaps,” says he, “upon a general survey of the grounds of equitable jurisdiction in cases of accident, it will be found that they resolve themselves into the following; that the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner; or that he will be subjected to an unjustifiable loss, without blame or misconduct on his part, or that he has a superior equity to the party from whom he seeks relief.”

If it were conceded that the complainant has acted without blame on her part, yet the evidence in the cause falls far short in my judgment of shewing that she has a superior equity to the party from whom she seeks relief. But can it be successfully contended, that the complainant is not justly chargeable with negligence? If in point of fact it was the intention of the commissioners to have allotted the lot in question to her, it was her duty, growing out of her obligations to the rest of the community, to have carefully examined the award of the commissioners within a proper time, and had such errors corrected in

it as might have been the result of accident or mistake; but instead of doing this, the award and decision of the commissioners is permitted to remain of record, to deceive the public.

The latter in tracing the title to the property, would naturally have recourse to the will of *George Heide*, and by that, it would be found, the award and decision of the commissioners, was final and conclusive on the devisees of said *Heide*. This being so, how is it competent for the complainant, without ever having made an effort to correct the error in the record, if any such in point of fact existed, to have a superior equity to a third party, who, without notice of any error, acted on the faith of the public records? But it is said on the part of the complainant, that the defendants, *Morris* and *Jones*, had notice of the claim of the complainant, and this averment is sought to be sustained by the testimony of *Thomas Ferguson*, who proves that soon after the award, she was put in possession of the premises, and continued to take the rents and profits.

In answer to this view, it need but be observed that the defendants most positively deny any knowledge of the claim of complainant, until the time of the sale directed to be made by this court. But it is further urged, that inasmuch as it is proved in the bill, that complainant did receive the rent of the lot, such receipt of the rent was a circumstance sufficient in itself to put the defendants on the look out; and in support of this view, the case of *Moale vs. Buchanan*, 11 *Gill & John*. 314, is relied upon. According to my apprehension of that case, it is wholly insufficient for the purpose for which it is invoked. The question there, as it is here, was, in whom resided the superior equity? But the facts there, were different from what they are here. There the creditors acquired a specific lien in virtue of the contract and the delivery of the possession: here there was no specific lien acquired by the complainant, her right depending entirely on the award and decision of the commissioners; and at least so far as third parties are concerned, to be ascertained only by a reference to that award which by the express language of the will under which complainant claims, is made final and conclusive on her and her legal representatives.

To this award, the defendants, *Morris* and *Jones* had recourse, and they acted in conformity with its resolutions. The defendants having procured a good title under the mortgage the question presents itself, whether the notice which was given by complainant's counsel at the time of the sale, affected the title which the purchaser then obtained?

It has long since been settled, that a party having notice, is protected in his title, provided he derives it from one who had none. "Thus," says *Story*, in his *Equity Jurisprudence*, vol. 1, sec. 409, "a purchaser with notice may protect himself, by purchasing the title of another *bona fide* purchaser for a valuable consideration without notice, for, otherwise, such *bona fide* purchaser would not enjoy the full benefit of his own unexceptionable title. Indeed, he would be deprived of the marketable value of such a title, since it would only be necessary to have public notoriety given to the existence of a prior incumbrance, and no buyer could be found, or none, except at a depreciation equal to the value of the incumbrance."

Without noticing other questions which might be considered in connection with this case, such as competency of commissioners to affect their award as against third parties by subsequent testimony on the subject, I see nothing in the cause which induces the opinion, that the equity of the complainant is superior to that of the defendants, *Morris* and *Jones*, for, to say the least, she certainly has been equally negligent with them, if any negligence can be imputable to them; and as that negligence on her part occasioned the error, if any they have committed, she cannot be entitled to relief as against them. When presented, I will sign a decree in conformity with these views.

Accordingly on the 6th day of February, 1846, *Baltimore* county court, sitting as a court of equity, decreed, that the bill of complaint be dismissed so far as respects the said defendants, *Morris* and *Jones*, and each of them, with costs. And so far as respects the said defendants, *William Norris* and *Mary Ann* his wife, the order of publication heretofore passed in this cause, having been duly published, and the said defendants

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having failed to appear and answer the bill of complaint, it is decreed, that the said bill be and the same is hereby taken *pro confesso* against said defendants, *Norris* and wife. And so far as respects the defendant, *Rachel Heide*, it is decreed, that the complainant is entitled to relief as against her in the premises. And in order to enable this court to decide what relief the said complainant is entitled to as against said defendants, *Norris* and wife, and *Rachel Heide*, it is ordered that this cause, so far as relates to said defendants, be and the same is hereby referred to the auditor of this court, with directions to ascertain the value of said lots of ground and premises distinguished in the proceedings as lots A and C, and the difference of the values of the same, and also, the rents and profits which said complainant and said defendants, respectively have received from said lots respectively, or either of them, and to state an account thereof between all said parties, ascertaining and showing therein the proportion of the amount coming to complainant, which is to be paid by said *Rachel Heide*, the tenant for life, and the proportion to be paid by said *Norris* and wife, or either of them from the pleadings and proofs now in the cause and such other proofs (if any) as said parties or any of them may produce before him. And the said parties are hereby allowed to take testimony, &c.

From this decree, the complainant appealed to this court.

The cause was argued before DORSEY, CHAMBERS and MAGRUDER, J.

By McCULLOH and McMAHON for the appellants, and

By J. J. LLOYD for the appellees.

DORSEY, J., delivered the opinion of this court.

Believing that the testimony in this cause fully establishes the fact of the mistake made by the commissioners in their return, to the Orphans Court for *Baltimore* County, of the allotment by them made, under the last will and testament of *George Heide* deceased, by the assignment of lot C on *Franklin* lane to *Eliza*



*Baynard*, instead of lot A on *Cheapside* street; and in the assignment of lot A on *Cheapside* street, as part of the dower of *Rachel Heide*, with remainder over to *Mary Ann Norris*, instead of lot C on *Franklin* lane; the inquiry arises, are the defences set up by the answer, according to the proofs in the case, sufficient to prevent a court of equity from rectifying this mistake, and giving to the complainant the relief sought by her bill of complaint?

As a bar to such relief the defendants, *Morris* and *Jones*, assert in their answer, that they are *bona fide* mortgagees, for a valuable consideration, without notice of the claim of the appellant. In answer to this defence, the appellant insists that the allotment made by the commissioners created only an equitable estate in the real property to them respectively allotted, and that to consummate the legal title thereto in the parties to whom it was in severalty, respectively assigned, deeds of conveyance *inter se* duly executed, acknowledged and recorded, were necessary; and that to a *bona fide* purchaser of such an interest in realty, no protection is given against a prior equity. That this answer of the appellant would have been a conclusive answer to the defence set up by the appellees, *Morris* and *Jones*, could not be denied, if the fact upon which it is based had been true, viz: that by the allotment of the real estate made by the commissioners under the last will and testament of *George Heide*, the residuary legatees took nothing more than equitable estates in the portions severally assigned to them. But such was not the effect of the allotment and return thereof made by the commissioners. By it the residuary legatees took legal estates in the portions of the realty, severally, and to them respectively, assigned, under and by virtue of the last will and testament of *George Heide*.

At the present day, it cannot be doubted, that a defendant being a *bona fide* purchaser, &c., can by way of answer as effectually defend himself against a complainant, asserting a prior equitable claim, as he could by interposing the usual plea in bar founded on such a purchase. But to render such a defence available at the trial, the answer must contain an aver-

ment of every material fact requisite to sustain such a plea if demurred to. Does the answer of *Morris* and *Jones*, contain all such material averments, is, therefore the obvious inquiry to be made in this case? It does sufficiently state some of the facts indispensable to such a plea, to wit: the transfer of the legal title, the mortgage to the defendants, *Morris* and *Jones*, the *bona fides* of the transaction, and valuable consideration paid; and the payment of this consideration before they had any notice of the claim of the appellant. But the answer has altogether omitted to state one fact, which is essential to the validity of a plea, that the defendant is a *bona fide* purchaser, &c. Wherever the estate conveyed is one to which possession is incident, and is not a mere dry remainder or reversion, it is indispensably requisite to the validity of such a plea, that it should state that the grantor or mortgagor was, at the time of the conveyance, seized, or pretended to be seized, and was possessed of the premises conveyed; as authorities for which, see *Equity Draftsman*, 449. 3 *Sugden Vendors* 345–346. *Daniels vs. Davison*, 16 *Ves.* 249. *Boone vs. Chiles*, 10 *Peters*, 211.

If to the validity of such a plea, the statement as to the possession of the grantor be essential, it is equally necessary, when such a defence is relied on at the final hearing, that a like averment, as to such possession, should be made by the answer; and had such an averment appeared in the answer of the defendants, *Morris* and *Jones*, it is conclusively disproved by the testimony in the cause. They cannot therefore protect themselves against the prior equity of the appellant, by the defence relied on in their answer, that they were *bona fide* purchasers without notice, &c. The defendants, however, must fail in protecting themselves as such *bona fide* purchasers without notice upon another ground. The fact averred in the answer (and without which the defence cannot for a moment be sustained,) is legally disproved by the testimony in the cause, which demonstrates that not only at the date of the mortgage, but for more than ten years before, the appellant had, through her tenants, been in the undisturbed possession and enjoyment of lot A, conveyed by *Jones* to *Hilde* the testator.

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In *Hardy & Talburt vs. Summers and wife*, 10 Gill & Johns. 324, this court have said that the fact of the possession of a party, whose rights are involved in a purchase, is a sufficient intimation of those rights, to put the purchaser upon an inquiry into their nature; and failing to make it, he is in equity visited with all the consequence of a knowledge of his title.

In *Graff, &c. vs. Castleman, &c.* 5 Randolph, 207, the Court of Appeals of *Virginia* say: thus in any purchase, if there be circumstances, which, in the exercise of common reason and prudence ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact, which that inquiry would give him.

In *Pendleton vs. Fay*, 2 Paige, 202, it was decided that a purchaser, whenever he has sufficient information to put him on inquiry, in equity, is considered as having notice; and in such case he will not be deemed a *bona fide* purchaser.

For the establishment of so well settled a principle, a reference to further authorities cannot be necessary.

This court will sign a decree, reversing with costs, to the appellant, in both courts, the decree of the county court, passed in this cause, except that part thereof which decrees that the bill be taken *pro confesso* against the absent defendants, which is affirmed, and will sign the usual order remanding the cause to the county court, that a decree may be passed appointing a trustee to convey lot A to the appellant, her heirs and assigns; and that an account may be taken of the rents and profits received by the appellees, from lot A, and the amount thus found to be due, be decreed to be paid by them to the appellant; and that said lot C may be conveyed by said trustee to the appellees, their heirs and assigns, by way of mortgage, to be held by them, as mortgagees, in the same manner as if it had been a part of the property conveyed to them by the mortgage of *Rachel Heide*, and *William Norris* and *Mary Ann*, his wife.

DECREE REVERSED IN PART AND CAUSE REMANDED.

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Hall vs. U. S. Insurance Co.—1847.

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DANIEL W. HALL vs. THE UNITED STATES INSURANCE COMPANY OF BALTIMORE, FOR THE USE OF THE RECEIVERS OF SAID COMPANY.—*December, 1847.*

Where an original subscriber to the stock of an incorporated company, bound to pay the instalments upon his subscription, from time to time, as they were called in by the company, transfers his stock to another, with his assent, such other person is substituted to the rights and obligations of the original subscriber, and bound to pay up instalments called for, after the transfer to him.

Payment of instalments, by a transferee of stock, is evidence of his assent to the transfer to him.

When the charter of a company declares that no stockholder, indebted to the company, shall be permitted to transfer his stock, until his debt be paid or secured to the satisfaction of the directors: this is a privilege which may be waived or asserted, at the pleasure of the president and directors.

Instalments upon subscriptions to stock not called in are not within the meaning of such a clause. It relates to debts due and payable in *presenti*, not in *futuro*.

A transfer of stock on the books of an incorporated company, is merely to pass it to the transferee, and is as good between the parties, if made without consideration, as if made with it. It does not profess to disclose the consideration which induced it, nor the terms of the contract from which it emanates, and of which it is the consummation.

Proceedings in equity against an insolvent corporation, to have receivers appointed, and unpaid instalments, due from corporators collected—the court appointed them with orders to coerce payment. In an action at law against a delinquent stockholder, such proceedings are evidence against him, though not a party to the bill, for the purpose of showing by what authority the action was prosecuted.

Stockholders in chartered companies, bound to pay instalments as called for upon notice from such companies, are affected by notices published in the newspapers where the companies transact their business. They cannot require personal notice, and where receivers are appointed to collect the sums due from them, they possess the powers of the directors of such companies, as given by their charters in such cases, both as to time of payment, and amounts called in. The substitution of such newspaper publications, in lieu of personal notice, has so long been an universal usage, and of a notoriety equal to that of newspapers themselves, that the custom of doing so has become a part of the law of the land.

An order of court which directed receivers to give sixty days notice, by advertisement in three of the newspapers printed in the city of B., to all the stockholders of, &c. to pay the remaining instalments due on their stock respectively, and that if they fail to pay according to said notice, the said receivers



shall proceed forthwith to coerce the payment of the same by suit, is not to be interpreted as requiring them to call for the *whole* amount of unpaid instalments upon sixty days notice, but leaves to the receivers the power of fixing the amount of instalments called for, in conformity with the provisions of the charter of any such company.

Where the defendant prays the court to instruct the jury that the plaintiff is not entitled to recover, the grounds assigned for that instruction must be co-extensive with the plaintiff's right, as established by the proof, or it is not error to refuse it.

To claim a right of discount or set-off, is not an obligation or duty on the part of him who is entitled to it. He may waive or assert it at his election. Having once waived it, and thereby obtained a dividend out of the effects of his debtor, to which, neither at law nor in equity, would he otherwise have been entitled, he will not afterwards be permitted to assert his claim by way of discount or set-off. To suffer him to do so, would, in contemplation of law, if not in fact, be practising a fraud upon the other creditors of his debtor.

#### APPEAL from *Baltimore County Court.*

This was an action of *Assumpsit*, commenced on the 31st August, 1837, by the *U. S. Insurance Company*, against the appellee. All errors of pleading were waived by consent.

It was agreed by the parties in this cause that the plaintiff may give in evidence, on the trial of this action, any facts or circumstances which would be admissible upon any special declaration, or count in a declaration, that the evidence to be offered would legally authorise; and that the defendant under the general issue of *non assumpsit* may give in evidence any matters which he could or might do upon any special plea, or account or matter in bar, or by way of off-set, and that either party upon the trial may object to the competency of any evidence, and raise and have the benefit of any points or questions of law that might have been raised by demurrer, or otherwise, in any stage of the pleadings, or upon trial upon any issues that might have been lawfully made or joined upon any state of the pleadings; and that it is admitted that the defendant held, as owner, the policies issued by the *United States Insurance Company*, the plaintiff at the time of its failure, and before the thirty-first day of May, 1834, numbered 1243, 1243, 948, 1055, 1486, and 1151, and that he has ever since continued to hold the same

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to this time, and that they were duly presented for payment at the office of said company when due.

1st EXCEPTION.—Upon the trial of this cause, the plaintiffs, to support the issue on their part, read in evidence the act of Assembly of *Maryland* creating the plaintiffs a body corporate, passed at December session, 1831, chap. 191, and the following agreement for subscription to the stock of said corporation:

“We, whose names are hereunto subscribed, do promise to pay to the president and directors of the *United States Insurance Company of Baltimore* the sum of twenty dollars for every share of stock in the said company set opposite to our respective names, agreeably to an act of the State of *Maryland*, entitled An act to incorporate the *United States Insurance Company of Baltimore*.” Witness our hands this fifteenth day of March, eighteen hundred and thirty-two.

Which, it is admitted, was signed by *Joseph P. Grant*, for one hundred shares of the stock of said company. And further read in evidence the certificate of election of directors of said corporation.

*United States Insurance Company of Baltimore,  
Baltimore, March 31st, 1832.*

The undersigned commissioners, having given the public notice required by the charter, on this day held an election, between the hours of 10 o'clock A. M. and 1 o'clock P. M., for eight directors, to serve for the ensuing year, when, upon counting the ballots, the following gentlemen were found to be duly elected: *Peter Neff, &c.*

And gave in evidence that the said corporation was after the agreement or subscription of said stock organized agreeably to the requirements of said act of incorporation. And also offered in evidence the following instrument of writing, purporting to be a transfer of said one hundred shares of stock to the defendant, in form following, to wit:

“I hereby transfer to *D. W. Hall* an hundred shares of stock now standing in the name of *Joseph P. Grant* on the books of

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the *United States Insurance Company of Baltimore*. Witness my hand this 12th day of July, 1832. *Joseph P. Grant.*”

And offered in evidence, by *Joshua J. Atkinson*, a competent witness, that after the date of said transfer the said defendant paid several instalments on said one hundred shares of stock, that were called for by the president and directors of said company.

The defendant objected to the reading of said instrument of writing, purporting to be a transfer, as incompetent and inadmissible as evidence to prove that the said defendant, by virtue thereof, become the owner of said stock, or a stockholder in said company, notwithstanding the said defendant paid several instalments after the time of said supposed transfer, because the said *Grant*, by virtue of the said agreement or subscription for said stock, and by virtue of the act of Assembly aforesaid, became a stockholder debtor to said company for the whole sum of twenty dollars upon each and every of said shares, including the nine dollars upon each of said shares sought to be recovered in this action; and because, by the provisions of the ninth section of said act of Assembly, no stockholder, indebted to the company, is permitted to make a transfer or receive a dividend until such debt be paid, or secured to the satisfaction of the president and board of directors of said company; and, furthermore, because there is no consideration expressed in said supposed transfer, for the making thereof. Which objection the court (LE GRAND, A. J.) overruled, and admitted the aforesaid instrument of writing in evidence. The defendant excepted.

In addition to the facts stated in the foregoing exceptions, and which, it is agreed, shall form part of this

2ND EXCEPTION. The plaintiffs, further to prove the issue on their part, offered to read in evidence the following proceedings in *Baltimore* county court, in equity, in a certain cause wherein *William H. Stump* is complainant and the *United States Insurance Company* aforesaid is defendant, viz:

“Ordered by the court this 24th May, 1834, that injunction issue, as prayed upon the complainant’s filing bond, with security to be approved by the judges of this court, in the penalty of

twenty thousand dollars, to indemnify the defendants against all costs and damages from said injunction. And it is further ordered by the court, that the defendants shew cause on Tuesday next at 10 o'clock, why a receiver should not be appointed to take charge of all the effects of the defendants, and administer the same according to justice and equity, provided a copy of this order be served on the president of the said company, or on the board of directors of said company, or left at the office for doing business of said company, before 3 o'clock of this day. Signed, S. ARCHER, R. B. MAGRUDER, JOHN PURVIANCE, Judges of B. C. C.

And also the following petition:

*To the Honorable, the Judges of Baltimore*

*County Court, in Equity:*

The petition of *Harman Stump*, of *Harford* county, sheweth to your honors, that he heretofore filed his bill of complaint in this honorable court, against the *United States Insurance Company of Baltimore*, and that upon the prayer contained in that bill, your honors appointed *James Harwood*, *John B. Howell* and *Walter Farnandis*, receivers of the estate and effects of said company, as will be seen by reference to said bill of complaint, and the proceedings now therein remaining of record, in this court. Your petitioner further shews, that the former president and directors of said company, to wit, *Peter Neff*, *Job Smith*, *John Patterson*, *John A. Hamilton* and *Joseph P. Grant*, were each holders of a large amount of the stock of said company, on which there was, and still is due to said company, unpaid instalments to a large amount, and that said president and directors, when they knew said company was insolvent, and when too, that insolvency had been produced by their management, assigned and transferred their stock to irresponsible persons, for the purpose of exempting themselves from liabilities for the unpaid instalments of said stock, and in fraud of your petitioner and the other creditors of said company. Your petitioners further shew, that all the stockholders of said company, owe to said company nine dollars, on each share of stock, and that by the act of incorporation, said



stockholders are entitled to a notice for sixty days, previous to the time at which the unpaid instalments can be demanded. That said company is insolvent, and that all its effects and estate, together with the unpaid instalments due on its stock, is wholly insufficient to pay its debts. Wherefore, your petitioners pray your honors will direct and order said receivers to institute suits against said president and directors, for the unpaid instalments on said stock so fraudulently assigned as aforesaid, and to give notice to all other stockholders and persons, liable to pay the unpaid instalments on said stock, to pay the same. And upon their failure to do so, to institute suits for the recovery of the same. And your petitioners, &c.

On the foregoing petition it is ordered by the court, this 26th June, 1834, that the aforesaid receivers institute suit against the president and directors therein named, as prayed, and that the receivers aforesaid, give sixty days notice, by advertisement, in three of the newspapers printed in the city of *Baltimore*, to all the stockholders of the said *Insurance Company*, (except said president and directors,) to pay the remaining instalments due on their stock respectively. And it is further ordered, that if said stockholders fail to pay, according to said notice, that said receivers forthwith proceed to coerce the payment of the same by suit, unless said receivers shew cause to the contrary, on or before Tuesday next. Provided a copy of this order be served on or before Saturday next.

R. B. MAGRUDER,

JOHN PURVIANCE.

And it is further agreed, that the persons named as receivers in said proceedings were duly appointed and qualified to act as such.

To the reading of all and every part of which proceedings the defendant objected as incompetent and inadmissible, because they are proceedings in equity and in a case still pending; and because the defendant was not a party to said cause in equity, nor to any of said proceedings. Which objection the court overruled, and admitted the aforesaid proceedings in evidence. The defendant excepted.

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**3RD EXCEPTION.** In addition to the facts stated in the foregoing exceptions, which are agreed shall form part of this, the plaintiffs then further offered in evidence the following notices, having proved that they were published in three newspapers in the city of *Baltimore*.

“Office of the Receivers of the *United States Insurance Company of Baltimore*, (*South street*,) June 30th, 1834.”

“By virtue of an order of *Baltimore* county court, notice is hereby given to the stockholders of the *U. States Insurance Company of Baltimore*, that an instalment of one dollar on each share of the capital stock of said company is required to be paid to the receivers on or before the first day of September next, and that an additional instalment of two dollars on each share of said stock is required to be paid on or before the first day of October next, and also an instalment of two dollars on each share of said stock on or before the first day of November next.

By order of the Receivers of the *U. S. I. Co.*

July 3rd, 1834.

*G. W. Atkinson*, Secretary.”

Another notice was published on 17th October, 1834, requiring the stockholders to pay an instalment of four dollars on each share of stock standing in their respective names, by virtue of and in compliance with an order of *Baltimore* county court, and proof of their publication was also given.

To the admission of which notices the defendant objected, as incompetent and inadmissible evidence to charge, or *affect*, the defendant as notices required by the terms of the second section of said act of incorporation, and because they were not made by the president and directors of said company, or by their authority, and because said notices are not sufficient legal notices to charge the defendant.

But the court overruled the objection, and admitted the said notices in evidence. The defendant excepted.

**4TH EXCEPTION.**—In addition to the facts stated in the foregoing exception, and which it is agreed shall form part of this, the plaintiffs further offered in evidence the following proceedings, signed by the president and four directors of said corporation, viz:

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*Baltimore*, 24th June 1837. At a meeting of the directors, held this day, at which the undersigned directors were present, it was resolved, that the president cause notice to be given through the public papers, to the stockholders of this company, to pay up the balance of the stock remaining unpaid, in the following instalments, viz : Five dollars on the 26th day of August, and four dollars on the 26th day of October, to be paid to Mr. J. J. Atkinson, at the office of the Receivers of the company. Signed, *Hugh Birckhead, President U. S. Ins. Co. James Harwood, George H. Newman, John Kettlewell, Philip J. Dawson.*

And proved the publication thereof.

To the admission of all which notices the defendant objected, as incompetent and inadmissible to charge or affect him with a liability to pay any one of the instalments therein called for ; which objection the court overruled, and admitted the aforesaid proceedings in evidence. The defendant excepted.

5TH EXCEPTION.—In addition to the facts stated in the foregoing exceptions, which is agreed shall form part of this, the defendant, to support the issue on his part, and to bar a recovery by the plaintiff, read in evidence to the court and jury, by way of discount in bar or off-set, the following short copy of a judgment, obtained in *Baltimore* county court on the 2nd February, 1837, by *Daniel W. Hall* (the defendant in this action,) against the *United States Insurance Co. of Balto.*, (the plaintiff in this action,) with a statement of the amount due thereon, and on oath of said Hall, as a probate annexed :

DANIEL W. HALL vs. THE UNITED STATES INSURANCE COMPANY OF BALTIMORE.—In *Baltimore* county court, January Term, 1837.

Debt, nar, &c. 2nd February 1837, judgment by confession for \$1,000 debt, and \$500 dam's in nar and costs. Damages to be released on payment of interest on debt from 11th August 1834, and costs. Writ issued 30th August, 1834. Plaintiff's costs, \$10 13½.

I hereby certify that the foregoing is a true short copy of the

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judgment, taken from the record of proceedings of said court in the above cause. And I further certify that there is no entry or proceeding in said court to shew that said judgment has been satisfied.

In testimony whereof, I hereto set my hand and affix the seal of *Baltimore* county court, this first of June, eighteen hundred and forty-six.

(Seal's place.)      *A. W. Bradford*, Cl'k *Balto. Co'ty Co't.*

*Statement of the amount due on the above mentioned judgment :*

To the principal debt, . . . . .	\$1,000 00
To interest thereon from 11th Aug. 1834 to 20th	
Octo. 1841, . . . . .	431 50
	<hr/>
	1,431 50
And costs, . . . . .	10 13
	<hr/>
	1,441 63
1841, Octo. 20, Credit by cash, . . . . .	120 00
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	1,321 63
Int. on \$1,321 63 until 1st June, 1846, . . . . .	365 85
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Amount due, . . . . .	1,687 48

And proved, by the record of said court, that the action in which said judgment was rendered was instituted on the 30th August 1834, and the cause or causes of said action, upon which said judgment was rendered, were two policies or writings obligatory, for the payment, to bearer, of \$500 each, duly executed by the *United States Insurance Company* aforesaid, and sealed with its corporate seal, both dated the 4th April 1834, and numbered 1243, and payable, one on the 4th, and the other on the 11th August 1834, the *form* of which policies is as follows :

210<sub>1000</sub><sup>20</sup>.

210<sub>1000</sub><sup>20</sup>.

Policy No. 1053. In consideration of securities deposited and of the premium paid thereon, the *United States Insurance*



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*Company of Baltimore* guarantees to the bearer, the payment of the sum of two hundred ten  $1\frac{9}{10}\%$  dollars, on the 18th August 1834, on presenting this policy for payment, at their office. *Baltimore*, Jan'y 29, 1834.

*G. W. Atkinson*, Sec'y.

*Peter Neff*, Pres't.

And also read in evidence, by way of discount in bar or set-off, three other like policies of said company, sealed with its seal, of the several numbers, and for the several amounts and dates, and payable or due at the respective times as follows, viz: one policy No. 1053, dated Jan. 29th 1834, due Aug. 18th 1834, for \$210 92; one policy No. 1086, dated Feb. 11th 1834, due Sept. 1st 1834, for \$139 93, and one policy No. 1154, dated March 1834, due May 14th 1834, for \$102 95. And it was and is admitted, that the said *Daniel W. Hall* was the bona fide holder and owner of all of said policies, including those upon which the said judgment was rendered when the said company failed, and before the proceedings in equity aforesaid were instituted, and before the said receivers were appointed, and has continued ever since, such holder and owner of the same. And it was further admitted, that a dividend was declared by order of court of the assets received by said receivers, as appears by the proceedings in the equity case aforesaid, and that said *Hall* received of the receivers a dividend of twelve per cent. upon each of the said claims, so offered by way of discount in bar or off-set.

The defendant prayed the opinion and direction of the court to the jury, as follows: that the plaintiff is not entitled to recover upon the evidence in this action.

1. Because, upon the evidence, the law does not imply any *assumpsit* on the part of the defendant to pay any of the instalments called in after the said receivers were appointed.

2. Because the said court had no jurisdiction or power as a court of equity, in said equity cause, to determine that the defendant should pay any of the unpaid instalments upon said one hundred shares of stock subscribed for by said *Grant* being a part, viz: nine dollars per share upon such of said shares, unpaid and uncalled for at the time when the said receivers were

appointed, nor to determine when they should be paid, nor any jurisdiction or power to authorize the said receivers to call in and collect of the defendant, or sue him for any of said instalments, this power having been vested exclusively in the president and directors of said company by the act or charter of its incorporation, read in evidence by the plaintiffs, and because the said *Grant* was and is the only person responsible (if any person is responsible,) to pay those instalments, by virtue of his original express agreement, and promise to pay the same by the terms of his subscription, as prescribed by said charter, and is in fact made by him, which precludes any implied *assumpsit* on the part of the defendant to pay the said instalments, or any part thereof. And furthermore, because the said court as a court of equity destroyed, or essentially and materially impaired the considerations and benefits that might accrue to the defendant as a stockholder, by assignment of said stock from said *Grant*, under the provisions and franchises of said charter.

3. That the instalment of \$2 per share called for by the receivers and made payable on the 1st October, 1834, could not be lawfully made payable on that day, it being only thirty days after the day on which a prior instalment was by them made payable.

4. Because the decree and proceedings in the case of *Stump vs. the United States Insurance Company of Baltimore*, put an end to all power of the president and directors of said company to call for the instalments, which are the subjects of the advertised notice on the part of said president and directors given in evidence, while the said decree remains in force.

5. Because the receivers appointed by the decree above referred to are not lawfully entitled to call for and receive the instalments mentioned in the public notices in evidence, notwithstanding the order of *Baltimore* county court, in said cause, authorizing the call and collection of the said instalments, there being no evidence of the instalments, or of any of them, having been called for by the president and directors, and having become payable before the appointment of receivers as aforesaid.

6. Because the proceedings and order of *Baltimore* county

court, given in evidence, do not, nor do any of them, estop the defendants from maintaining in this action that the said court had no authority to direct said receivers to make the calls for the instalments, for recovery of which this action is brought.

7. Because the said order of *Baltimore* county court, directs the total amount of the instalments payable on the stock to be called for upon sixty days notice, contrary to the charter given in evidence, which allows no larger amount than five dollars upon such period of notice at any one time to be called for, while the testimony and claim of the plaintiffs, in this cause shew that the amount of unpaid instalments was nine dollars at the date of said order, and of the filing of the petition whereon it was passed.

8. Because the said order of *Baltimore* county court has not, in respect of the notice thereby directed, been complied with, inasmuch as by the showing of the plaintiffs the notice for one of the instalments was, for the first time, published on the third day of July, in the year eighteen hundred and thirty-four, and required payment of said instalment on the first day of the next ensuing September; and because said notice was not sufficient in that it was published only (daily) four times during the period between the third day of July, 1834, and said 1st day of September.

9. Because said order had not been complied with, inasmuch as it required, according to the due construction thereof, that one payment of all the said instalments should be made, and that the amount of all should be comprehended in a notice or notices for one and the same day of payment, while the evidence shows that said entire amount was divided into several sums, and called for by separate notices for said several sums respectively to be paid on different days respectively.

10. Because there is no evidence of personal notice to the defendant of the call for any of the instalments claimed in this case.

11. Because the contract given in evidence for payment of the instalments on the stock subscribed by the defendants is

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with the president and directors of the company and cannot be sued upon by the plaintiffs.

12. Because the order of the president, and of the directors, given in evidence, was signed and passed by only four directors and the president of the corporation, the number of directors being eight as prescribed by the charter; and there being no evidence of notice to all the directors to attend the meeting at which said order was passed, and not more than the said four directors and the president appearing to be present at said meeting.

13. And that the plaintiffs cannot recover in this cause the instalment of four dollars mentioned in the notice of 24th June, 1837, from the president and directors of said company, because the sum is made payable on the 26th October, 1837, and the present suit was instituted on 31st August, 1837.

14. And the defendant thereupon further prayed the opinion and direction of the court to the jury, that the defendant is entitled to the benefit of the balances due on said judgment and policies read in evidence, by way of discount, or set-off against the claim of the plaintiff in this action, notwithstanding the defendant did receive from the receivers, on the twentieth day of October, 1841, a dividend of twelve per cent. upon the principal sums of said policies, including those upon which said judgment was founded; and, furthermore, that the plaintiff is not entitled to recover if the jury find that the sum of money due on said judgment and on said policies, including interest, is equal to or greater than the amount of money which the jury may find due from the defendant to the plaintiff, upon the evidence in this action. All which prayers and directions contained in this 6th exception of the defendant, the court refused to grant, but granted the following prayer, on the part of the plaintiff.

The plaintiff prayed the court's opinion to the jury, that if they find, from the evidence, that the defendant became the owner of 100 shares of the stock of the *U. S. Ins. Co.* by regular transfer from original subscribers for such shares, and if they also find that the defendant, after so becoming the owner



of such shares, paid, as duly called for, the instalments due on each of said shares, except the two instalments sued for in this case, and if they find that said two instalments were called for, under the authority and in the manner stated in the plaintiff's evidence, and if they also find that the proceedings in equity were had, as also given in evidence by plaintiff and the receivers appointed under the same, duly qualified according to the terms of the decree or under it in said case, that then the defendant is not entitled, by way of set-off, or discount, to have set-off or discounted from plaintiff's said claim, either the judgment or the policies he has given in evidence; provided the jury shall find that defendant came in under said equity proceedings, in said equity case, and made claim for and obtained a dividend upon his said judgment and policies out of the assets claimed and distributed in said case. To which refusal and opinion of the court as to all the prayers or points of defendant, as also to its opinion and direction in granting the plaintiff's *said* prayer, the defendant excepted.

The defendant appealed to this Court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By HINCKLEY, for the appellant and

By REVERDY JOHNSON, for the appellee.

DORSEY, J., delivered the opinion of this court.

The suit before us was instituted to recover certain instalments on the stock of the *United States Insurance Company*. And to show the defendant's liability for the payment thereof, after proving that *Joseph P. Grant* was an original subscriber for one hundred shares of the stock of the company, the plaintiff below gave evidence of the following transfer thereof to the defendant below, to wit:

“ I hereby transfer to *D. W. Hall* an hundred shares of stock,

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now standing in the name of *Joseph P. Grant* on the books of the *United States Insurance Company of Baltimore*.

Witness my hand this 12th day of July, 1832,

Witness present, *J. J. Atkinson.*                      *Joseph P. Grant.*”

And to prove the defendant's assent to the transfer thus made to him, the plaintiffs gave evidence by *Joshua J. Anderson*, a competent witness, that after the date of said transfer, the said defendant paid several instalments on said one hundred shares of stock, that were called for by the president and directors of said company. Whereupon the said defendant objected to the reading of said instrument of writing, purporting to be a transfer, as incompetent and inadmissible as evidence to prove that the said defendant, by virtue thereof, became the owner of said stock, or became a stockholder in said company; notwithstanding, the said defendant paid several instalments after the time of said supposed transfer, because the said *Grant*, by virtue of the said agreement or subscription for said stock, and by virtue of the act of Assembly aforesaid, (meaning the charter of the company) became a stockholder debtor to said company for the whole sum of twenty dollars upon each and every of said shares, including the nine dollars upon each of said shares sought to be recovered in this action; and because, by the provisions of the ninth section of said act of Assembly, no stockholder indebted to the company, is permitted to make a transfer or receive a dividend until such debt be paid, or secured to the satisfaction of the president and board of directors of said company; and furthermore, because there is no consideration expressed in said supposed transfer for the making thereof. Which objection the court overruled and the defendant excepted.

Was the county court right in so doing is the question involved in the defendant's first bill of exceptions?

The appellant insists that there is error in the county court's decision, because *Grant*, by subscription for the stock, became a debtor to the company for the sum of twenty dollars on each share of the stock, which included the amount for which suit had been instituted against him. But there is nothing in this objec-

tion. The transfer of the stock having been duly made to him; and he having assented thereto, as is unequivocally demonstrated by his payment of instalments subsequently called in by the president and directors of the company, he was, in respect to said stock, substituted to all the rights and liabilities which would have attached to *Grant*, had he continued the owner thereof, and no such transfer had ever been made. And there is quite as little weight in the appellant's second reason, assigned in support of his objection, founded on the ninth section of the act of Assembly of 1831, ch. 191, which declares, that no stockholder indebted to the company shall be permitted to transfer his stock, until such debt be paid or secured to the satisfaction of the president and board of directors.

The object of this section was to confer a privilege, not to impose an imperative duty, upon the company. Being a privilege, it might be waived or asserted, at the pleasure of the president and directors. And the transfer having been by them permitted, it was as valid and obligatory upon the appellant, as if no such indebtedness had existed. But suppose the ninth section of the act were to be construed, not as conferring a privilege, but as imposing a duty. Instalments not called in, constituted no such indebtedness as was contemplated by the act of Assembly. It contemplated only a *debitum, solvendum in presenti*, not in *futuro*. To give to the charter of the company the construction contended for by the appellant, would be to render its stock wholly untransferrable, until the par amount of it had been paid up. Although the requisite instalments for that purpose had never been called in by the president and directors.

And there is still less foundation for the third reason urged to sustain the appellant's objection to the testimony offered, viz: because there is no consideration expressed in said supposed transfer, for the making thereof. It is as good, *inter parties*, if made without consideration, as if made with it. The only office of the transfer is to pass the stock to the transferee. It professes not to disclose the consideration which induced it; or the terms of the contract from which it emanates; and

of which it is the consummation. There is, therefore, no error in the ruling of the court below, in the first bill of exceptions.

Neither is there any error in the court's overruling the objection of the appellant to the testimony offered by the appellee in the second bill of exceptions. The proceedings of *Baltimore* county court when sitting in equity, which were objected to as evidence, were not offered as an adjudication of any of the rights of the parties in any suit between them, and upon that ground as admissible evidence in the present controversy; but were offered, without reference to the parties thereto, for the purpose of shewing by what authority the present action was prosecuted. In that aspect of their being offered, they are obnoxious to neither of the reasons urged for their rejection. The court's order for the institution and prosecution of this suit was definite and final. As to the power exerted by *Baltimore* county court, sitting in equity, in the proceedings before it, it is believed no well-founded exception can be taken. It was indispensably necessary for the prevention of fraud; and to do justice to persons whose grievances were undeniable and incapable of relief any where else, or in any other way, than in that pursued by the county court. In such a case, and under such circumstances, it cannot be necessary to cite authorities to establish the propriety of the exercise of such a power. The county court then committed no error in overruling the objection taken by the appellant to the testimony offered by the appellee in the second bill of exceptions.

On the third bill of exceptions, the appellant has insisted that the county court in overruling his objection to the testimony offered by the appellee, erred upon three grounds: first, because by the second section of the act of 1831, ch. 191, no call for the payment of any instalment on the stock of the company was legal, unless made by the president and directors thereof. Secondly, that a notice for the payment of such instalments must be personal notice, and that no newspaper publication thereof was sufficient. And thirdly, that the notices given by the receivers were insufficient, because by the provisions of the company's charter, sixty days must intervene



between the times for the payment of each instalment. Having asserted the legality of the proceedings of the county court in assuming the jurisdiction, which it sought to exercise through the instrumentality of receivers, it follows as a necessary consequence, that under the court's order of the 26th June, 1834, the receivers had the same power to determine on the times of payment, and the amount of the instalments called in, that the president and directors of the company possessed, when uncontrolled by any intervention of the county court upon the subject.

In support of the second ground of objection: that the notice for the payment of the instalments must be personal; and that no newspaper publication thereof is sufficient. No authorities have been referred to; and there is nothing in the act of Assembly to induce a belief that it contemplated or required such notice to be personal. On the contrary, there is every reason to induce the adoption of a contrary opinion. The act of Assembly provides for the subscription of ten thousand shares of stock; amongst how many persons they may be distributed, not even a conjecture could be formed: they may have amounted to thousands. Of their respective residences there is equal, if not greater uncertainty, the law making no provision for a registry thereof, which it certainly ought to have done, had such personal notice been deemed necessary. And there is no proportionate object attained for the great inconvenience, labor, and expense, incident to such a notification, conceding it to be practicable. Persons who are stockholders in such a corporation are not inattentive to the concerns thereof, and obtain information in relation to its proceedings either through their own inquiries or the communications of friends resident at or near its office of business, or from publications in newspapers edited in its vicinity. The substitution of such newspaper publications in lieu of personal notice, has so long been an universal usage, and of a notoriety equal to that of the publication of newspapers themselves, that the custom of doing so has become a part of the law of the land.

It is true that in many of the charters of such corporations, there are express provisions for the publication of newspaper notices. But such provisions are rather to be regarded as declaratory of what the law is, and ought to be, than innovations upon it. In the very charter before us, some such newspaper notices have been provided for; but there is nothing to be found in it, which induce even a momentary belief, that the legislature omitted to prescribe such a notice in the section now under consideration, in order that a personal notice might be given to each individual stockholder. The third reason assigned for the rejection of the testimony offered in this bill of exceptions, cannot be sustained without interpolating into the charter, a provision which it does not contain. It no where prescribes any length of time which shall intervene between the times for the payment of any of the instalments. That is a matter left entirely to the judgment and discretion of the president and directors. The only restriction imposed upon them, (in reference to instalments) for the benefit of the stockholders, is, that they shall be notified of their amount and time of payment, sixty days before the payment is required. No error is perceived in the ruling of the court in the third bill of exceptions.

The opinion expressed on the third bill of exceptions supercedes all necessity for the expression of any opinion on the defendant's fourth bill of exceptions.

In the fifth bill of exceptions, the defendant having offered in evidence by way of set-off, a judgment by him obtained against the plaintiff and three policies of the *United States Insurance Company*, and that he had been the *bona fide* holder of those claims before and ever since the failure of the company, and having admitted that, at a dividend made by the receivers of the assets of the company subsequently to the time when all the instalments called in by the receivers were payable, he had received a dividend of twelve per cent. on the full amount of his said claims, prayed the opinion and direction of the court to the jury, as follows: that the plaintiff is not entitled to recover upon the evidence in this action. And in support of his

prayer, assigned twelve separate reasons: the first, second, third, fourth, fifth, sixth, tenth and eleventh have been disposed of, and their insufficiency as the basis for the prayer predicated upon them, sufficiently shown by the preceding portion of this opinion.

The seventh ground on which the defendant claimed the granting of his prayer was: "because the said order of *Baltimore* county court directs the total amount of the instalments, payable on the stock, to be called for upon sixty days notice, contrary to the charter given in evidence, which allows no larger amount than five dollars upon such period of notice, at any one time to be called for, whilst the testimony and claim of the plaintiff in this cause shew, that the amount of unpaid instalments was nine dollars at the date of said order." Upon this ground, the appellant's prayer was properly refused, being founded in a misconception of the order of the court, which did not direct that all the instalments, which the receivers were to call for, should be made payable at one and the same time: but that sixty days notice should be given to the stockholders previously to the time of the required payment of the instalments, and leaving to the receivers the power of fixing the amount of the instalments called for, in conformity to the provisions of the charter. Such appears to have been the receiver's interpretation of the court's order; and their proceedings under it were designed to be in strict accordance both with it, and the charter.

The eighth reason is: "because the said order of *Baltimore* county court has not, in respect of the notice thereby directed, been complied with, inasmuch as by the showing of the plaintiffs, the notice for one of the instalments, was, for the first time, published on the third day of July, in the year eighteen hundred and thirty-four, and required payment of said instalment on the first day of the next ensuing September: and because said notice was not sufficient, in that it was published only (daily) four times during the period between the third day of July, 1834, and said first day of September." As to the first branch of this reason, however, it might be a bar to

the plaintiff's recovery of the first instalment, the payment of which was required on the first of September; it assuredly formed no bar to the recovery of the three other instalments, the payment of which was fixed for the first day of October, the first day of November, and twenty-second day of December: and consequently was no warrant for the granting of the prayer made to the court. The second branch of the reason interposed no barrier to the plaintiff's right to recover. The notice given, as respects the mode of publication in the newspapers, was a sufficient compliance with the order of the court, and the requisition of the charter; and, of course, in no wise sustained the prayer addressed by the appellant to the court.

The ninth reason assigned for the granting of the appellant's prayer is sufficiently answered and obviated, in what has been said upon the seventh reason.

The twelfth reason was abandoned by the appellant in the argument of this cause.

The defendant below, after enumerating the twelve grounds upon which he claimed the court's opinion and direction to the jury, that the plaintiff was not entitled to recover; with a view to obtain an additional opinion and direction from the court to the jury, makes the following addition to his prayer:

"And that the plaintiff cannot recover in this cause the instalment of four dollars, mentioned in the notice of 24th June, 1837, from the president and directors of said company, because it is made payable on the 26th of October, 1837, and the present suit was instituted on the 31st of August, 1837. Had this prayer been granted by the court, it is manifest that it would have been regarded by the jury, as, in fact, it would have been, a direction to them, that the plaintiff was not entitled to recover more than five of the nine dollars due on each of the hundred shares of stock, owned by the defendant. Such an opinion the court below could not have given to the jury, consistently, with the views herein before expressed as to the legality and sufficiency of the notices previously given by the receivers. In refusing this addition to the prayer of the appellant, the court below committed no error.



The only remaining prayer of the defendant below, in the fifth bill of exceptions, is in the record, numbered fourteen, and presents for our consideration the single question, whether the appellant after, in common with all other creditors, receiving from the receivers a dividend of twelve per cent. on the entire amount of his claim against the company, can be permitted to set off the balance due to him against the claim of the appellee in the present action?

This suit was instituted in the year 1837, and the dividend was declared and paid in the year 1841. That the defendant understood the nature of the dividend declared: that he made known to the receivers the amount of the company's indebtedness to him, on which he claimed his dividend, cannot well be doubted; because three out of the five policies of the company on which that indebtedness arose were payable to bearer: and the receivers, in the nature of things, must have been apprized of his being the holder thereof, through some communication from himself. Indeed, it is a natural inference, that to justify and protect themselves, they must have required an exhibition of the policies by him, who claimed a dividend on account thereof. To claim a right of discount or set-off, is not an obligation or duty on the part of him who is entitled to it. It is his privilege, which he may waive or assert at his election. But having once waived it, and thereby obtained a dividend out of the effects of his debtor, to which, neither at law nor in equity, would he have otherwise been entitled, he will not afterwards be permitted, either in a court of law or of equity, as a matter of right, to assert his claim by way of discount or set-off. To suffer him to do so, would in contemplation of law, if not in fact, be practising a fraud upon the other creditors of his debtor. And this may be briefly illustrated by a supposititious statement, entirely analogous to the case before us.

Suppose the claim of the company against the defendant was \$1,000, and that of the defendant against the company, \$1,150; upon the principles of discount or set-off, the actual indebtedness of the company would be \$150; the dividend of twelve per cent., on which is \$18, and that is all that the de-

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fendant could justly claim or receive under the dividend as made by the receivers. But instead of thus preferring his claim, he waives his right of set-off, and prefers his entire claim of \$1,150, and receives a dividend of \$138, instead of \$18; that is \$120 more than upon any principle of set-off, he had even the shadow of a claim upon the funds in the hands of the receivers. The county court were clearly right in refusing this prayer of the defendant. This view of the question renders it unnecessary to inquire into the general right of set-off, if no such dividend has been received by the appellant.

The granting of the prayer of the appellee would necessarily follow, from what has been said in relation to the prayers made by the appellant.

Concurring in all that has been done in this case by the county court, its judgment should be affirmed.

JUDGMENT AFFIRMED.

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RICHARD H. HEBB AND OTHERS, EXECUTORS OF JAMES HEBB, vs. CATHARINE HEBB, EXECUTRIX OF SAME.—  
*December, 1847.*

An appeal will not lie from an order of the Orphans court, refusing to revoke letters testamentary.

Where the widow of the deceased claimed certain bonds as donations *mortis causa*, and it did not appear affirmatively to the court at what time they were delivered by the alleged donor to his wife, whether in health, or in his last sickness, it was held she was not entitled to them as donations.

A conversation with a dying party, which may be considered as a narrative by him of what he had done upon a former occasion, is not sufficient to establish a *donatio mortis causa*.

A *donatio mortis causa* must be with a view to the donor's death; it must be conditional, only to take effect by the death of the donor, by his existing disorder. There must be delivery of the subject of donation. These are among the essentials of a valid gift of this description.

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APPEAL from the Orphans Court of *St. Mary's* County.

On the 3d May, 1847, the appellants filed their petition, alleging that they apprehend they are likely to suffer by the misconduct of the aforesaid *Catharine*, in the administration of the estate of the aforesaid *James*, and by the improper use and application by her of certain bonds, for the payment of money, to wit: bond of *B. G. Harris*, bond of *Richard Thomas* and of *John Wills*, which said bonds are assets belonging to the estate of the aforesaid *James*, deceased; and they therefore pray for subpcena, &c. And that the said *Catharine* may shew cause why her letters testamentary shall not be revoked, and the aforesaid bonds delivered over to the complainants, the remaining executors.

The answer of *Catharine Hebb* denied that she has been guilty of any misconduct in the administration of *James Hebb's* estate, on which she and the complainants were appointed by the will of the said *James Hebb* joint executors; and also denies that she wished to make any improper use and application of the bonds alluded to in said petition, or of any portion of the estate of the said *Jas. Hebb*; that the complainants entered into a joint bond, and herself in a separate bond, conditioned for the faithful performance of their duties as executors. As to the bonds alluded to in said petition, this respondent claims them as a "*donatio causa mortis*" from her husband, *James Hebb*; and as the court will recollect, she, herself, voluntarily offered, at a previous meeting of this court, to have the matter tested by your honors. Judgment which was opposed by the complainants themselves who have filed this petition, praying for a revocation of her letters, as if she were guilty of the grossest improprieties as executrix. This she denies, and prays the court to decide on the matter between the parties.

The defendant then proved by a witness, that she, the witness, was at *Mr. Hebb's* the last ten days before he died. He died of the illness with which he was then afflicted. The first of January, 1847, being two days before he died, she talked with the deceased about the bonds in question.

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*Mr. Hebb* stated on the night of the first of January last that he did not think all were satisfied with his will, and upon witness asking who he meant, he said his wife. Witness then asked what he had done for his wife. He stated he had left her in his will one-third of his personal property, and one-third of his lands, during her life. She, the witness, then asked what he did with those bonds, (meaning the bonds before the court, as here transcribed.)

1. Bond of *Richard Thomas* for \$500, dated 6th May, 1845, payable on demand to *James Hebb, &c.*

2. Bond of *B. G. Harris* and *H. G. S. Key* for \$1,000, dated 1st July, 1842, payable to *James Hebb, &c.*

3. Bond of *John B. Wills* for \$500, dated 2d June, 1839, payable to *James Hebb, &c.*

Which he always promised to give his wife. *Mr. Hebb* stated that they were his wife's; that he always intended them for her: that he had given them to her, and they were in her possession. Witness then observed that the bonds had been changed, so as to be made payable to him, the said *James Hebb*, and that *that* would deprive her (his wife) of them. *Mr. Hebb* then declared, that as they were changed, he still gave them to his wife, and again said, she, his wife, has them, and no one can take them from her.

Witness further states, upon question by the complainant's counsel, that one of these bonds, to wit: that of *John B. Wills* was taken by *Mr. Hebb* from the obligor after his marriage with *Mrs. Hebb*, for money which was owing from the said *John B. Wills* to *Mrs. Hebb*, for a legacy due to her since her marriage with the said *Mr. Hebb*. That the bond of *Mr. Richard Thomas* was taken by *Mr. Hebb* for money loaned to *Mr. Hewit*, and afterwards to *Mr. Thomas* by *Mr. Hebb*; and that the bond of *Benjamin G. Harris* was taken for a bond, due from *Henry G. S. Key* to *Mr. Hebb*, for money due to *Mrs. Hebb*.

The Orphans court (HEARD, GOUGH and LOKER, Justices) on the 16th June, 1847, decreed that the prayer of the petitioners be rejected; this court being fully satisfied from the



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evidence that the bonds referred to in the petition of the complainants were given to respondent by *James Hebb* as a *donatio causa mortis*: and being also fully satisfied that the said *Catharine Hebb* has been guilty of no misconduct, as executrix of *Jas. Hebb*, in making an improper use and application of the said bond. And that complainant's bill be dismissed with costs.

The complainants appealed to this court.

This cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By CAUSIN and DORSEY for the appellants, and

By B. G. HARRIS for the appellee.

MAGRUDER, J., delivered the opinion of this court.

From an order by an Orphans court, refusing to revoke letters testamentary, an appeal will not lie. If, therefore, the record which is before us presented no other question, the appeal would be dismissed. But the Orphans court, in this case, was called upon to decide another question.

The appellants are two of the executors of *James Hebb*: the appellee is the other. The appellants, by their petition, asked the Orphans court of *St. Mary's* county to revoke the authority granted to the appellee, upon the ground of misconduct by the latter; and this misconduct, it appears, consisted in withholding certain obligations which the testator held in his life-time, and which, it was insisted, was a part of his estate, to be administered by his executors. The appellee, in her answer, admits the obligations to be in her possession, and insists, that she claims them, and is entitled to claim them, as a *donatio mortis causa*. The court, upon the proof offered, decided that her title to the obligations was well founded, and this part of the decree is now the subject of review.

A *donatio mortis causa* is stated in *Matthews' Practical Guide to Executors and Administrators* to be, where one in his last illness, and apprehensive of the approach of death, delivers or causes to be delivered, to or for a party, the possession of any of his personal effects, to keep in the event of his death: and

such gift is always accompanied with an implied trust, that if the donor live, it shall revert to him. A party's wife is capable of such gift. *Preston*, in his *Treatise on Legacies*, stating the law of donations of this description (ch. 9) says, "they are an irregular kind of bequest, being a gift *inter vivos*, to be perfected *post mortem*."

There exist very serious objections to dispositions of this kind. This court, in the case of *Bradley & wife*, complainants, against *Hunt, admx. of Jack*. 5 G. & J. 56, urging the necessity of a strict adherence to the rule, that a delivery of the thing intended to be given, is essential to the perfection of the gift, and said: "if we were at liberty to do so, we should not so be disposed to relax the rule, which would be to open still wider, the door already sufficiently wide, to frauds and perjuries, and the exercise of undue influence by the artful and designing upon the weak and unwary." Other reasons may be urged why strict proof should be required in order to support such a donation. Gifts of this description are in every respect as objectionable as nuncupative wills. In speaking of the latter, the then Chancellor of *New York*, pronouncing the judgment of the Court of Errors, said (20 *John*. 5, 16,) "the title of the legatee depends altogether upon the precipitate death of the testator. Every day that his life is prolonged more and more impairs the character of the will; and it vanishes if he becomes convalescent. The legacy operates as a bounty upon his death. It becomes the interest of the legatee that the parties sickness should prove to be his *last* sickness; for if he recovers, the will, of course, falls to the ground."

And what is the testimony upon which the appellee relies to establish the title, which she sets up to the obligations spoken of in the proceedings in this case? But a single witness is produced, and from her, we get all that we are permitted to know of the testator, his illness, and declarations, and under what circumstances those declarations were made. By this witness, we are told, that she was at *Mr. Hebb's* the last ten days before he died. He died of the illness with which he was then afflicted. The first of January, 1847, being two days before

he died, *she talked with Hebb*, the deceased, about the bonds in question. *Mr. Hebb* stated on the night of the first of January, that he did not think all were satisfied with his will; and upon being asked who was not? said his wife. Witness then asked what he had done for his wife. He stated that he had left her in his will one-third of his personal property, and one-third of his lands during her life. The witness then asked what he did with those bonds? (the witness states, that she meant the bonds now claimed by the appellants) *which he always promised to give his wife?* *Mr. Hebb* stated that they were his wife's: that he always intended them for her; that he had given them to her, and they were in her possession. Whereupon, the witness observed, that they had been changed so as to be made payable to him, *James Hebb*; and that would deprive his wife of them. *Hebb* then observed, that as they were changed, he still gave them to his wife, and again said, his wife has them, and none can take them from her. This then was the conversation between *Mr. Hebb* and the only witness in the case, in regard to the bonds now claimed as a *donatio mortis causa*. Without remarking particularly upon this testimony, it is obvious that we are furnished in it with no very conclusive evidence that the deceased ever intended to make a *donatio mortis causa* of those bonds. Indeed, this whole conversation may be considered a narrative of what the deceased had done at some former, and it may be, distant period.

These obligations had been put into the wife's possession; but when? It may have been long before the illness of which he died, and before the execution of the will, which it appears that he made. He, it is supposed, always intended them for her, and yet did not give them to her by will.

A gift of this description must be with a view to the donor's death; it must be conditional—only to take effect by the death of the donor, by his existing disorder. There must be delivery of the subject of donation. *Williams on Executors*, 498.

These are among the essentials to a valid gift of this description, and of their existence in this case, the record does not furnish the necessary proof. All that the deceased is made to

say, is in answer to enquiries made of him, and information given to him by a person who is to be considered a stranger to the transaction.

The subject of the gift is to be delivered to or for the donor, to be kept in the event of his decease. If he live, the property is to revert to the donor. *Toller on Executors*, 233. Of such a gift, we hear nothing in the testimony. The deceased is made to declare that the obligations belong to his wife, none can (of course he himself could not) take them from her. The property is to be delivered in his last illness, and when apprehensive of the approach of death. At what time these obligations were delivered, and whether at that time he was not in perfect health, the record does not enable us to ascertain. We cannot decide that according to the proof the deceased delivered to or for his wife, these obligations, when he was in extremity, or was surprised by sickness, not having an opportunity of making his will.

We discover in the matter set forth in the petition, no ground for a revocation of letters testamentary; but the decree, so far as it declares that the bonds referred to in the petition of the complainants were given to the respondent, by *James Hebb*, as a *donatio mortis causa* must be reversed.

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1. Awards being intended to compose disputes, are entitled to the most favorable regard; and should receive such construction, if possible, as will give them force and effect: the same may be said of arbitration bonds. *Lewis vs. Burgess*, 129.
2. The condition of a bond was to keep the award of, &c., chosen to determine of and concerning the rent, that ought to be paid by *B.* to *L.* for her dower, in her deceased husband's estate, now owned and possessed by the said *B.* The arbitrators awarded that *B.* should pay to *L.* annually, the sum of, &c. for her dower. There is nothing in the language of either the bond or award, to restrict the application of either to time past, or to the future. *Ib.*
3. The legal effect of such a contract will be to place each of the parties in the condition in which they would have been, had a lease been executed at the annual rent named in the reference, of all the dower interest of *L.*, commencing when *B.* first had possession of the land encumbered with dower. *Ib.*

## ASSIGNOR—ASSIGNEE.

1. Under the act of 1830, ch. 165, the person for whose use a judgment has been entered, may prosecute a writ of *scire facias* to revive it in his own name. *Clark vs. Digges*, 109.
2. The term "equitable assignee," in that act, is sufficiently comprehensive to include the *cestui que use*. *Ib.*
3. A transfer of stock on the books of an incorporated company, is merely to pass it to the transferee, and is as good between the parties, if made without consideration, as if made with it. It does not profess to disclose the consideration which induced it, nor the terms of the contract from which it emanates, and of which it is the consummation. *Hall vs. U. S. Insurance Company*, 484.

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## ASSUMPSIT.

1. Where an action is brought by one of several, with whom a contract had been made, the defendant may take advantage of it upon evidence at the trial, upon the plea of *non assumpsit*. *Hoffar & wife vs. De-ment*, 132.
2. Admissions in a conversation, made by a defendant to a witness, who was *not* the agent of the plaintiff, nor had any authority to make a demand, or to account, that he, the defendant, was liable to pay the plaintiff for the rent of property, and intended to give his note for it, is no evidence to support a count of *insimul computassent*. *Ib.*
3. The tax on bank stock under the act of 1841, not being paid to the city of *Baltimore* by a stockholder, a non-resident, the city proceeded by way of attachment against the stock. After judgment of condemnation and execution levied upon the stock, the executor of the shareholder paid the city under protest, and brought an action of assumpsit to recover back the money, on the ground that the tax was illegally exacted. *Held*:
  1. That money paid on an execution issued upon a judgment of a court of competent jurisdiction, as in this case, cannot be recovered back in assumpsit, although it was afterwards discovered that the money was not due, and the plaintiff is in a situation to prove that fact. *Gordon, Ex. of Gordon, vs. M. & C. C. of Baltimore*, 231.
  2. Where money has been paid under the sentence or judgment of a court which has no jurisdiction whatever in respect of the subject matter, an action to recover it back may be maintained. *Ib.*
  3. With regard to the force and legal effect to be attributed to a domestic judgment, there is no distinction between a judgment of condemnation rendered in an attachment on warrant, in a case where the requisitions of the attachment laws have been complied with, and a judgment *in personam*. *Ib.*
4. *M.*, an inhabitant of the city of *Baltimore*, was a stockholder in several banks there, chartered prior to the year 1821. The Corporation of that city imposed taxes upon the stocks of said banks for the use of the city, and assessed a portion thereof to *M.*, who *voluntarily* paid such tax. Afterwards considering said taxes illegally levied, *M.* demanded the return of the money paid by him, which the city refused. In an action of assumpsit brought to recover back the taxes paid, *Held*, that whether the tax was illegal or legal, the payment being voluntarily made, could not be recovered back. *Morris vs. M. & C. C. of Balt.*, 244.

## ATTACHMENT TO COMPEL APPEARANCE OF A DEFENDANT AT LAW.

1. An attachment laid in the hands of the maker of a promissory note, as garnishee, for the debt of an endorsee then being the owner and holder of the note, followed by a judgment of condemnation on the attachment, will protect the maker, garnishee, in a subsequent action, brought on the same note, by a subsequent endorser receiving the note without notice. *Somerville vs. Brown*, 399.
2. In a case of *first impression*, depending on a statute, of which the lan-

# ATTACHMENT TO COMPEL APPEARANCE OF A DEFENDANT AT LAW—*Continued.*

guage was capable of a construction which might avoid embarrassment to the commercial, or any other portion of the community, the argument of inconvenience would justly have controlling influence. The act of 1796, ch. 56, in terms declares that a creditor, on certain conditions, may attach the lands, tenements, goods, chattels and credits of his debtor, speaks also of the liability of "a garnishee who is indebted in any sum of money," and is in this respect but a repetition of the act of 1715, by which an attachment was authorized against all goods, chattels and credits in the hands of any person whatever, and consequently authorizes the attachment of a debt due on a promissory note before its maturity in the hands of the maker, while the debtor continued the owner and holder of the note. *Ib.*

*See ASSUMPSIT, 3.*

CORPORATIONS, 1.

## BANKRUPT.

*See INSOLVENT DEBTOR.*

## BANKS.

1. To tax both the real and personal property, and stock, of a bank, would be a double tax, and therefore illegal and unjust. *Gordon, Ex. of Gordon, vs. M. & C. C. of Baltimore, 231.*
2. The act of 1821, ch. 131, sec. 11, did not restrain the city of *Baltimore* from taxing bank stock within her corporate limits; such an intention is not clearly expressed in that act. *Ib.*
3. The stipulation in the act of 1821, not to impose any further tax upon the banks mentioned in it, during the continuance of their charters, was intended to protect the banks against any additional tax for twenty years, which might be imposed by the legislature for State purposes. The terms further tax, under the circumstances, have no application to the city of *Baltimore*. It was not intended to exempt the banks there situated from all taxation. *Ib.*
4. The intention of the act of 1841, ch. 23, was to subject the stock of the banks to both State and city taxation. In relation to the State, this was a violation of the act of 1821. The right of the city to tax the stock, is unaffected by any constitutional inhibition. *Ib.*
5. Where by a transfer on the books of a bank, the corporation has notice of the trusts with which certain shares of its stock were clothed, and that the complainants were the legal proprietors thereof, the officers of such corporation being trustees of the stockholders cannot, without its being responsible, by any negligence or mistake allow the title to the stock to pass in a transfer by any other person than the trustees. *Farmers and Mechanics Bank et. al. vs. Wayman and Stockett, 336.*
6. By the act of 1826, ch. 107, sec. 12, it was directed that books should be kept at *F.*, in which should be fairly entered the names of the stockholders, the amount of stock belonging to each, and that transfers should be made on the books of the bank on proper application by the stockholders. Such a stock list was not kept by the bank; and in



**BANKS—Continued.**

consequence of which, the bank as it was then incorporated, consisting of the mother bank at *F.* and its branch at *W.* would have become responsible for any injury which had proceeded from such neglect. *Ib.*

7. Such a liability having been incurred, the act of 1829, ch. 35, which separated the mother bank and its branch into two independent corporations, does not destroy it. *Ib.*
8. Each, after the separation, ought to be held liable in equity for the prior neglect of duty, and in proportion to the capital of each; neither, present bank, can throw the whole loss upon the other. *Ib.*

See CORPORATION.

**BASTARDY.**

See ILLEGITIMATE CHILDREN.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.**

1. The statute of frauds on the subject of consideration, in agreements to pay the debts of third parties, has no application to instruments under seal. *Edelen vs. Gough*, 103.
2. The terms for value received in a written instrument, is a sufficient expression of a consideration required by the statute of frauds. *Ib.*
3. A note given to secure the anterior indebtedness of the defendant to the plaintiff, does not require words of consideration to support it. *Ib.*
4. In October, 1841, *R.* being indebted to a firm, of which *C.* was a partner, gave her notes, at his request, dated 1st November, 1841, payable in instalments at from one to five years, for the amount of the debt. One of those notes *C.* transferred to *A.* by way of security, and when it fell due *R.* gave her renewal note for a part of the same, also dated 1st November, payable in two years and six months, and due 1st May, 1844, to *W.*, the brother of *C.*, who endorsed it to the plaintiff. The time of that transfer did not appear. In an attachment commenced by a creditor of the firm, on the 10th January, 1842, against *R.* and *T.* as garnishees of *C.* survivor of such firm, judgment of condemnation was rendered in January, 1843, of said renewal note, in favor of the attaching creditor. On the 14th June, 1842, *C.* applied for the benefit of the insolvent laws of *Maryland*, and there was evidence tending to prove that he was *then* the holder of the said renewed note. *Held*, that if the jury believed that *C.*, when the attachment was issued, or when he applied for relief under the insolvent laws, was the holder of the said renewed note, then the endorsee of *W.* was not entitled to recover its amount from *R.* *Somerville vs. Brown*, 399.
5. An attachment laid in the hands of the maker of a promissory note, as garnishee, for the debt of an endorsee, then being the owner and holder of the note, followed by a judgment of condemnation on the attachment, will protect the maker, garnishee, in a subsequent action, brought on the same note, by a subsequent endorser receiving the note without notice. *Ib.*
6. If the debt due on a negotiable note could not properly be the subject

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

of an attachment until after its maturity, still, if the maker of the note, in a contest, in such a case, fairly resisted, has been adjudged by a court of competent jurisdiction, to pay such a debt to an attaching creditor of the holder of the note such maker would find a defence in such a judgment of condemnation, and not be adjudged to pay the same debt twice. *Ib.*

7. The insolvency of the holder of a note or bill of exchange, passes the title thereto to his trustee, and disables the insolvent from conveying an interest in the bill or note, after the date of his personal discharge, and before its maturity, even to an endorsee without notice of his insolvency. *Ib.*
8. *D.*, a resident and citizen of *New York*, sold and delivered goods in that city to *R.*, a resident and citizen of *Maryland*, for which the latter on the 12th May, 1841, in fact, gave the former his note at six months, dated 6th November, 1840, due 9th May, 1841. On the back of that note was endorsed a receipt of the 12th May, 1841, of *L.* in *Maryland*, for merchandise to the value of \$535, and several promissory notes of third parties for \$538 80, from *R.* on account of the note at 6 months, which was delivered up to him. On the 12th May, *R.* was insolvent, which fact was known to *D.*, for whom *L.* acted as agent. In August following, *R.* applied for relief under the insolvent laws of *Maryland*. In an action of trover, brought by his permanent trustee against *L.*, to recover the value of the merchandise and notes which he received from *R.* *Held*:

1. That the original contract between *D.* and *R.* was a *New York* contract, in legal contemplation to be performed there, and governed by the laws of that State.
2. That the note subsequently given by *R.* to *D.*, as evidence of his indebtedness, could not alter the locality of the original contract.
3. As that note was not paid, *D.* might have sued on the original contract. *Larrabee vs. Talbott*, 426.

See PLEAS AND PLEADING, 9, 10, 11.

## BILL OF REVIEW.

See PLEAS AND PLEADING IN EQUITY.

## BILL OF SALE.

See SALES OF PERSONAL PROPERTY, 1, 2, 3.

## BOND.

A seal *per se* imports a consideration. *Edelen vs. Gough*, 103.

See ARBITRATION, 1, 2, 3.

EVIDENCE, 27.

## BRITISH STATUTES.

11 *Geo.* 2, ch. 19. See *Dent and Hancock*, 120.

See STATUTE, 13 *Eliz.* ch. 5.

## CASES EXPLAINED OR OVERRULED.

1. The case of *Reade vs. Livingston*, 3 *John. C. R.* 481, erroneous as to the exposition given to the statute, 13 *Eliz.* ch. 5. *Worthington and Anderson vs. Shipley*, 449.

## CITY OF BALTIMORE.

See MAYOR AND C. C. OF BALTIMORE.

## COMMISSION TO TAKE PROOF.

1. It is the practice in all the county courts of the State to order commissions to take proof to issue upon the affidavit of parties, where no other objection is made than the insufficiency of the affidavit of the party himself for such a purpose. *Penn et al. vs. Isherwood*, 206.

## CONFIRMATION.

See COURT OF CHANCERY, 8, 9.

## CONSIDERATION.

See BOND, as to effect of a Seal, 1.

COURT OF CHANCERY, 22, 29, 30.

## CONSTITUTIONAL LAW.

1. The decisions of the Supreme Court of *The United States* are of conclusive force and effect when deliberately formed and expressed on a question of construction of the Constitution of *The United States*, or of an Act of Congress made pursuant thereto. *Wilson vs. Turpin*, 56.
2. No person by vows of any description, can exempt himself from any of the duties which the State may require of him, nor forfeit any of the rights of citizens, which, but for the vows, would have belonged to him. *Smith vs. Young & wife*, 197.
3. The power of appropriating to a public use the property of individuals, when public necessity or utility requires it, upon securing to the party whose property is sacrificed, a just compensation for any injury he may sustain, resides in the State as a portion of its inherent sovereignty. *Alexander & Wilson vs. M. & C. C. of Balt.*, 383.
4. It is this supreme power over the property of individuals which enables the State to confer upon our subordinate jurisdictions, both municipal and judicial, the right to take private property, for the purpose of opening streets and roads, when in their opinion it is demanded by the public welfare and convenience, adequate provision being made for indemnification. *Ib.*
5. The decisions of the Supreme Court of the *United States*, upon all questions of constitutional law, are to be received as conclusive. *Larrabee vs. Tulbott*, 426.

See BANKS, 3, 4.

## CONSTRUCTION OF ACTS AND STATUTES.

1. Although the exception in the act of 1729, ch. 8, sec. 5, is broad enough in terms to defeat a *bona fide* purchaser, who has paid his money on the faith of a legal transfer or security, to be forthwith executed, if the rights of a creditor should happen to intervene; still it is not always to have that construction, but has been so considered in equity, as to avoid many of the inconveniences which a literal interpretation of it would inflict. *Alexander et al vs. Ghiselin et al*, 138.
2. An act is not necessarily inoperative, where its whole purpose cannot be carried into effect. *Gordon, Ex. vs. M. & C. C. of Balt.*, 231.

CONSTRUCTION OF ACTS AND STATUTES—*Continued.*

3. It is a sound rule in the exposition of statutes, that they should be so construed as not to suffer any part of them to be defeated or eluded. *Ib.*
4. Exemptions claimed under legislative acts, should be so clearly secured and granted, as to be free from all doubt and ambiguity. Otherwise the immunity claimed will not be considered as surrendered by the public. Various decided cases on this subject considered. *Ib.*
5. In a case of *first impression*, depending on a statute, of which the language was capable of a construction which might avoid embarrassment to the commercial, or any other portion of the community, the argument of inconvenience would justly have controlling influence. The act of 1796, ch. 56, in terms declares that a creditor, on certain conditions, may attach the lands, tenements, goods, chattels and credits of his debtor, speaks also of the liability of "a garnishee who is indebted in any sum of money," and is in this respect but a repetition of the act of 1715, by which an attachment was authorized against all goods, chattels and credits in the hands of any person whatever, and consequently authorizes the attachment of a debt due on a promissory note before its maturity in the hands of the maker, while the debtor continued the owner and holder of the note. *Somerville vs. Brown*, 399.
6. Inconvenience alone will not induce the court to construe an act, directly in violation of its plain language and apparent design. *Ib.*
7. The late bankrupt law of the *United States* was enacted on the 19th August, 1841. It expressly provided that it should take effect only from and after the 1st February, 1842. This is equivalent to declaring that it should have no effect until that day, and hence it did not suspend the operation of the State insolvent laws until that day. *Larrabee vs. Talbott*, 426.

See GIFTS OF SLAVES.

STATUTE, 13 *Eliz.* ch. 5.

## CONTRACT.

1. If a contract be as well established, it imposes the same moral and equitable obligation to perform it when verbally made, as if made in writing, and the legal effect of the terms of the agreement will be the same, in the one case, as in the other. *Alexander et al vs Ghiselin et al*, 138.
2. In a court of law, a party claiming under a contract must claim according to its terms. If he venture to speculate on a contingency, over which he has no control, he must abide the issue; and if the event does not occur, as he has assumed, the contract is at an end. *Ib.*
3. But even at law, if one party be prevented by the other from performing the contract, he can recover from that other, by showing a performance of as much as it was permitted him to perform, and a readiness to perform the residue. *Ib.*
4. Where a single bill is made payable to *F.*, agent, and the declaration describes it as made to *F.*, this is not a variance. The addition of the word agent in such case is a mere description, and is like the case of a note payable to an executor. The promise is to the agent personally. *Graham vs. Fahnestock*, 215.



CONTRACT—*Continued.*

5. Whether the obligee of a bill is empowered to assign it, is a question of law. A plea which puts that question to the jury is bad on demurrer. *Ib.*
6. *F., Senior*, devised separate and distinct portions of his land to each of his three sons, *J., M.* and *F., Junior*; and to his two sons, *J.* and *M.*, an equal interest in the coal mine and saw mill on the part devised to *F., Junior*, as he took under his father's will. That estate he orally contracted to sell to *N.* In this state of things, *J., M.* and *N.* agreed with each other, that they and their heirs and assigns should thereafter have and enjoy free and equal intercourse to each one undivided third part of all the coal in and on all our land; that is to say, *F.'s, Junior*, part now sold to *N.* *J.* agreed to let *M.* and *N.* have free intercourse to the coal mines on his property left him by his father, and to let *M.* and *N.* have the privileges of coal on his land, building a house at the mouth of the pit for the conveniency of coal diggers. *M.* gave to *J.* and *N.* the same privileges; and *N.* gave to *J.* and *M.* the same privileges, and "to share alike and alike." This agreement, which was under seal, further declared, that *J.* and *M.* doth agree to give to *F., Junior*, and his heirs, the privilege of the interest of their two shares of coal, all that he will haul with his own teams, or his heirs, by digging coals for himself, or themselves, for which the said *F., Junior*, doth agree to keep the banks in complete order, so as not to injure them by digging, to destroy the banks. Shortly after this, *F., Junior*, conveyed his interest by deed to *N.* *Held*,
  1. That the clause in the agreement,—“that is to say, *F.'s, Junior*, part now sold to *N.*,” was not an exposition of the whole instrument, and did not restrict and confine the whole contract to the land sold by *F., Junior*, to *N.*, for neither *J.* nor *M.* could confer upon *N.* any benefit in his own land and coal.
  2. That clause was intended to show, and shows, out of what land and coal, *N.* designed to secure a benefit to *J.* and *M.*, and obliges him to allow them the privileges they claimed under their father's will.
  3. The parties had declared that all three and their heirs should have and enjoy free and equal intercourse to each one undivided third part of all the coal in and on all our land, and the subsequent terms, “that is to say, &c.,” qualify those general expressions, and point out what land, as respects *N.'s* obligation, they were intended to include.
  4. This agreement so far contains the essentials of a contract, and the intention of the parties is so manifest on its face, that a court of equity may decree its specific execution. *Young vs. Frost et al.* 287.
7. Courts of justice, as far as practicable, will avoid such constructions of agreements, as may render them void; and endeavor to give an operative and binding meaning and intention to the stipulations of the contracting parties. *Ib.*

CONTRACT—*Continued.*

8. Upon a contract under seal, containing mutual stipulations, a court does not affect to weigh the actual value, nor insist upon the equivalent in contracts, where each party has equal competency. *Ib.*
9. Improvidence or inadequacy of consideration, do not determine a court of equity against decreeing specific performance. When undue advantage is taken, it will not enforce that. *Ib.*
10. *D.*, a resident and citizen of *New York*, sold and delivered goods in that city to *R.*, a resident and citizen of *Maryland*, for which the latter, on the 12th May, 1841, in fact, gave the former his note at six months, dated 6th November, 1840, due 9th May, 1841. On the back of that note was endorsed a receipt of the 12th May, 1841, of *L.* in *Maryland*, for merchandize to the value of \$535, and several promissory notes of third parties for \$538 80, from *R.* on account of the note at 6 months, which was delivered up to him. On the 12th May, *R.* was insolvent, which fact was known to *D.*, for whom *L.* acted as agent. In August following, *R.* applied for relief under the insolvent laws of *Maryland*. In an action of trover, brought by his permanent trustee against *L.*, to recover the value of the merchandize and notes which he received from *R.* *Held*:
  1. That the original contract between *D.* and *R.* was a *New York* contract, in legal contemplation to be performed there, and governed by the laws of that State.
  2. That the note subsequently given by *R.* to *D.* as evidence of his indebtedness, could not alter the locality of the original contract.
  3. As that note was not paid, *R.* might have sued on the original contract. *Larrabee vs Talbott*, 426.
11. Upon a contract made with a citizen of *Maryland*, out of this State, to be performed in another State, by a citizen of another State, a discharge, obtained under the insolvent laws of *Maryland*, cannot affect the right of the creditor to an absolute and unqualified judgment in the courts of this State, and to place his execution upon any property of the insolvent debtor, to be found undistributed in the hands of his permanent trustee, under our insolvent system. *Ib.*

See COURT OF CHANCERY, 23, 28, 29, 30.

## CONTRIBUTION.

See BANKS, 5, 6, 7, 8.

COURT OF CHANCERY, 10.

## COPARCENERS.

1. In this State, the children of parents who die intestate, seized in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the act of 1820, ch. 191, sec. 5. *Hoffar & wife vs. Dement*, 132.
2. Whatever be the number of coparceners, they all constitute but one heir; are connected together by unity of interest, and unity of title. *Ib.*
3. Coparceners cannot separately maintain an action for money had and received against a person who had received the rent of their land as trustee, nor recover in separate actions, upon an implied demise, upon a count for use and occupation. *Ib.*

## CORPORATIONS.

1. Municipal and private corporations may proceed under the act of 1832, ch. 280, as natural persons may, to recover debts due them by attachment on warrant. And where the attachment is laid upon property within the State, though the debtor is a non-resident, there can be no objection to the jurisdiction of the courts to enforce the claim by condemnation and sale of the property attached. *Gordon, Ex. of Gordon vs. M. & C. C. of Balt.*, 231.
2. Where an original subscriber to the stock of an incorporated company, bound to pay the instalments upon his subscription, from time to time, as they were called in by the company, transfers his stock to another, with his assent, such other person is substituted to the rights and obligations of the original subscriber, and bound to pay up instalments called for, after the transfer to him. *Hall vs. U. S. Ins. Co.*, 484.
3. Payment of instalments, by a transferee of stock, is evidence of his assent to the transfer to him. *Ib.*
4. When the charter of a company declares that no stockholder, indebted to the company, shall be permitted to transfer his stock, until his debt be paid or secured to the satisfaction of the directors: this is a privilege which may be waived or asserted, at the pleasure of the president and directors. *Ib.*
5. Instalments upon subscriptions to stock not called in are not within the meaning of such a clause. It relates to debts due and payable in *presenti*, not in *futuro*. *Ib.*
6. A transfer of stock on the books of an incorporated company, is merely to pass it to the transferee, and is as good between the parties, if made without consideration, as if made with it. It does not profess to disclose the consideration which induced it, nor the terms of the contract from which it emanates, and of which it is the consummation. *Ib.*
7. Proceedings in equity against an insolvent corporation, to have receivers appointed, and unpaid instalments, due from corporators, collected—the court appointed them with orders to coerce payment. In an action at law against a delinquent stockholder, such proceedings are evidence against him, though not a party to the bill, for the purpose of showing by what authority the action was prosecuted. *Ib.*
8. Stockholders in chartered companies, bound to pay instalments as called for upon notice from such companies, are affected by notices published in the newspapers where the companies transact their business. They cannot require personal notice, and where receivers are appointed to collect the sums due from them, they possess the powers of the directors of such companies, as given by their charters in such cases, both as to time of payment, and amounts called in. *Ib.*
9. The substitution of such newspaper publications, in lieu of personal notice, has so long been an universal usage, and of a notoriety equal to that of newspapers themselves, that the custom of doing so has become a part of the law of the land. *Ib.*
10. An order of court which directed receivers to give sixty days notice, by advertisement in three of the newspapers printed in the city of B., to

CORPORATIONS—*Continued.*

all the stockholders of, &c. to pay the remaining instalments due on their stock respectively, and that if they fail to pay according to said notice, the said receivers shall proceed forthwith to coerce the payment of the same by suit, is not to be interpreted as requiring them to call for the *whole* amount of unpaid instalments upon sixty days notice, but leaves to the receivers the power of fixing the amount of instalments called for, in conformity with the provisions of the charter of any such company. *Ib.*

*See* BANKS.

## CO-SECURITIES.

*See* COURT OF CHANCERY, 10.

## COURT OF CHANCERY.

1. Surviving partners who show by their answer to a bill filed for an account by the administratrix of a deceased partner, that they never consented to receive her as a partner after the death of her intestate, and acknowledge their liability to account, cannot claim to have the partnership accounts brought down to a period subsequent to the dissolution caused by death. *Goodburn & wife vs. Stevens, et al*, 1.
2. When a partnership is dissolved by death of a partner, the accounts are to be taken at that time, for the purpose of ascertaining the condition of the partnership, and the rights of the respective partners to the joint property. *Ib.*
3. Where it appeared that real estate had been used by a partnership for a long series of years in the manufacture of iron, and that upon the death of any partner, his heirs at law, to whom the land descended, came into the partnership in his place, and there was no proof of any articles of partnership, it was held, that the whole partnership estate, whether consisting of real or personal property, was to be regarded in equity as a consolidated fund to be appropriated primarily and exclusively to the satisfaction of partnership debts. *Ib.*
4. A trustee filed a bill against all his *c. q. t.* for a settlement of the trust estate. Whilst pending, propositions of compromise were made; and that the parties might be fully informed of their rights, the books of the trust were subjected to examination; accounts were examined by the *c. q. t.*'s solicitors and some of the *c. q. t.* and a skilful accountant, at the request of the trustee's solicitor; upon that examination, the solicitor of the *c. q. t.* advised a compromise, which was effected, and carried into execution. Every facility was furnished for the examination of the accounts. No evidence of books or accounts kept back. The solicitors of the parties were fully competent to determine what was due. This led to the execution of a release, by the complainant to the trustee, while under age. Twelve days after he came of age, and about fourteen months after the execution of the *first* he executed a *second* release. *Held*, that the *second* release was based on the *first*; was not subject to the imputation of undue influence, and was made with knowledge of his rights by the complainant, and therefore valid. *Forbes vs. Forbes*, 29.



COURT OF CHANCERY—*Continued.*

5. A release executed by a ward, or *cestui que trust*, shortly after he attains age, without the necessary accounts or information from which a judgment may be formed of the condition of the estate, would not meet the favor of a court of equity. *Ib.*
6. The determination of the question, whether necessary information was imparted to a ward or *cestui que trust* to enable him or his advisers to form a judgment of the condition of the estate, and decide whether such a release is valid, render it necessary to examine into the circumstances connected with it—the conduct and acts of the parties anterior to its execution, though occurring during the minority of the ward or *c. q. t.* *Ib.*
7. Where two releases—one before arriving at age, and another within twelve days after full age, were executed—if at the time of the *first* release, the necessary information was imparted and the examination of friends and advisers of the *c. q. t.* as to the state and condition of the trust fund was had: these must be considered as the operating causes for the *second* release at the time of its execution. *Ib.*
8. After accounts between trustee and *c. q. trusts* have been examined by the parties to a bill filed for that object by the trustee, and a release executed, where there is no proof of concealment, upon a bill filed to impeach such release, after a lapse of ten years from its execution, the trustee will not be required to produce actual proof of detailed information of what the records and accounts displayed. *Ib.*
9. Upon such a bill to impeach the release, the court will presume that the *c. q. t.* being a party to the *first* bill filed by the trustee as aforesaid, had knowledge of every thing he was entitled to know, and proper to be known, for a right decision in regard to his release; and that therefore a dismissal of the bill upon the agreement of the *c. q. t.* several years after, with his trustee, for such dismissal, is such a recognition of his release, as would amount to a confirmation of it, considering it merely as voidable. *Ib.*
10. In 1821, *S.* was appointed guardian, and gave bond with *F.* and *H.* as his sureties. In 1825, *S.* died insolvent, and in debt as guardian. *H.* was appointed his successor, and *F.* became his surety. The *second* guardian before he had received any part of his ward's funds, charged himself with the balance due from his predecessor. In 1845, the infant sued the second guardian's bond, and recovered judgment against *H.* and *F.* when the second guardian paid the ward a greater sum than he had received in fact from the first. The ward then assigned the judgment to *F.* who was about to sue out execution against *H.* for the whole judgment, though he had, in fact, but paid a part of it. *Held:*
  1. Whether one surety can sue another security to the same instrument, for contribution in a case where the plaintiff by a change of his relation, had only made himself constructively liable for the debt secured. *Qr.*
  2. That the claims between the co-sureties having become compli-

COURT OF CHANCERY—*Continued.*

- cated by sundry payments and receipts, and on adjusting which, accounts would be necessary to show the true payments, made a case for equity.
3. That a surety who had become constructively liable at law to the principal creditor by charging himself with sums he had not in fact received, would not be concluded in equity as related to his co-surety originally liable for contribution by his admission, where a remedy suitable to the circumstances of the case would be extended.
  4. It being admitted that there was a balance due from *S.* the first guardian, for which *H.* and *F.* were both liable, that *H.* had not received it in fact, and *S.*'s estate insolvent, made a case for contribution, and against equity for *F.* to endeavor to recover the whole amount of the judgment recovered against him and *H.*
  5. When a party applying for an injunction admits that he owes a balance to the person to be enjoined, the court may require such balance to be brought into court to be paid accordingly. *Flickinger vs. Hull*, 60.
  11. Where the land of which a husband died seized, is sold by a court of equity for the payment of debts, by reason of the insufficiency of his personal estate to pay them, and his widow is a party to such proceeding; if the land is decreed to be sold free from the claim of dower, the widow would be barred of her right of dower so long as the decree remained unreversed. *Gardner vs. Miles*, 94.
  12. A court of law will not decide, collaterally, whether the decree of a court of equity is correct. If a case is stated in the pleadings, which gives the court of equity jurisdiction, it is all that need be ascertained. *Ib.*
  13. An equitable mortgage may be enforced against others than the contracting party. *Alexander vs. Ghiselin*, 138.
  14. A court of equity may specifically execute a contract for a mortgage or other equitable lien, against creditors. *Ib.*
  15. The rule that equity regards as done that which was agreed to be done, is part of our law. The instances in which it has been enforced, and against the very terms of the registry acts, are numerous. *Ib.*
  16. A written contract to execute a mortgage, clearly expressed, made *bona fide*, and for full value, raises an equity for the party claiming under such contract, that prevails over the legal rights of creditors. *Ib.*
  17. Courts of equity have properly required, that every agreement should be clearly and explicitly established, before it will lend its aid to enforce it. *Ib.*
  18. *G.* held a mortgage on real estate, the first incumbrance; she was prevailed on to agree that it should be postponed in favor of individuals, who were expected to loan the mortgagor a further sum of, &c. to pay off and discharge liens on his estate and other debts; on condition that she should receive as additional security, a mortgage on her mortgagor's negroes. Two persons had promised to loan the amount on receiving mortgages, to which hers should be postponed; and it was expected by

COURT OF CHANCERY—*Continued.*

all that the required sum would be raised on these terms. The deeds were prepared, as well the mortgages to the persons who were to loan the money, as the mortgage to *G.* on the negroes. A mortgage to one of the persons who was to loan a part of the money, was also prepared and executed by *G.* and her mortgagor; but the other who had agreed to loan the balance declined doing so, and the amount was not procured. *Held*, that *G.* had performed the condition on her part, so far as to be entitled to specific execution of the agreement, to give her a mortgage on the negroes to the extent of the sum borrowed. *Ib.*

19. The rule in equity permits a party specifically to enforce a contract who has performed so much of it as to incur loss, if he is in no default for not performing the residue. *Ib.*
20. Another creditor of the mortgagor, participating in the arrangement by which *G.*'s first lien was to be waived, and her debt further secured by the lien on his negroes, finding that his claim would be postponed for many years, required of the mortgagor, who agreed, that he should likewise have a security on the negroes. *Held*, that the terms of this agreement were neither vague nor uncertain. *Ib.*
21. An existing creditor demanding specific security for his debt, and obtaining the promise of the debtor to comply, is to be considered in a court of equity, as favorably as a creditor, who at the moment of becoming a creditor, obtains a pledge for a specific security. *Ib.*
22. The existence of a debt at law is a consideration for an express promise, equivalent to the advance of an equal amount for the transfer of property, and ought to be a sufficient basis in equity on which to rest an agreement, fair in all other respects, and will sustain an agreement by a debtor to give a specific lien to a creditor. *Ib.*
23. After an execution levied, the debtor paid off part of the judgment, and entered into an agreement with the plaintiff, that for the balance he would convey his interest in a lot, upon which the plaintiff agreed to discharge him. This agreement is not sufficient to arrest proceedings on the judgment. *Gurley vs. Hiteshue*, 217.
24. Under such an agreement, where the debtor seeks a perpetual injunction against his creditor, his bill must be considered as one to enforce specific execution of his contract. The injunction in such case maintained, would accomplish all the purposes of specific execution. *Ib.*
25. A decree of specific execution here, would require the creditor to receive a conveyance and execute a release, and that release presented to a court of law, would prevent further proceedings on the judgment. *Ib.*
26. The leading object in every case of specific performance, is to carry into full effect, the exact object and intentions of the parties to the agreement on which its demand depends. *Ib.*
27. This is done on the ground, that where an honest and fair contract has been entered into by parties competent to engage without imposition or mal-practice on either side, no advantage should be taken by either of any subsequent change of circumstances, or of opinion which

COURT OF CHANCERY—*Continued.*

- might alter, or be supposed to alter, the benefits resulting to the parties respectively. *Ib.*
28. Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made the basis of a contract, the extraordinary jurisdiction of the court will not be exercised by coercing a specific performance. *Ib.*
  29. Where a defendant, debtor by judgment, paid the plaintiff a part of his debt and proposed to pay the balance by the conveyance of a lot in which he had no interest, in consideration of a release to be granted him, and then seeks to procure a specific execution of the contract, it is asking the court to compel the creditor to exonerate him without consideration. If he intended to obtain a release, by nominally giving an equivalent, knowing it to be so, it would be a fraud. *Ib.*
  30. A decree founded upon agreement to convey land in consideration of a release of a debt should provide as well for the transfer of the property as the execution of the release. *Ib.*
  31. By decree of a county court as a court of equity, passed in 1836, certain lands belonging to infants and others were ordered to be sold. The trustee appointed to sell the same, reported a sale, which was finally ratified. The purchaser by his last will devised the lands to the complainants, who, in 1839, filed their bill in the same court to procure a conveyance from the trustee. The decree thus sought to be carried out was not appealed from and remained unreversed. In the consideration of that decree, *Held*:—That if the bill filed in the cause in which that decree was passed, was founded on the act of 1785, ch. 72, the jurisdiction of the court could not be sustained, because there was no allegation in the bill that it would be for the interest and advantage of the infants, and of the other persons concerned, that the lands described in the bill should be sold. *Tomlinson et al. vs. McKaig et al.* 256.
  32. Under the act of 1820, ch. 191, sec. 8, if the parties entitled to an intestate's estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, an application should be made to the county court of the county where the estate lies, whose course of procedure is there prescribed, to sell the land, and distribute the proceeds. *Ib.*
  33. A formal application in such cases may be made by bill to the county court as a court of equity. *Ib.*
  34. In April, 1826, *I.* transferred to *R.* and *H.*, trustees under the will of *L.*, for the benefit of *A.* wife of *S.*, during her natural life, and after her death in trust for the infant devisees in said will, and pursuant to an order of the Chancellor of 20th January, 1826, certain shares of the capital stock of the *Bank of W.* The books of the bank showed the transfer as above. The bank was incorporated at *W.* in 1815, and in 1821 was authorized to establish an office at *F.* In 1827, the principal bank was transferred by law to *F.*, with a branch at *W.*; the offi-



COURT OF CHANCERY—*Continued.*

cers at *W.* furnished a list of stockholders to those at *F.*, by which it appeared that the stock stood in the name of *A.* wife of *S.* In 1829, these institutions were declared separate and independent corporations, and in 1830, the stock standing at *F.* in the name of *A.* wife of *S.*, was by them sold and transferred to an innocent third party, without the knowledge of *R.* and *H.* the trustees. After this *S.* died; *A.* administered upon his estate; and it coming to the knowledge of *H.*, one of the trustees, that the bank stock at *W.* had been transferred and sold by *S.* and wife, he applied to her, and she paid him in 1833, through the surviving partner of her husband, \$1000, and in 1842 delivered him certain stocks, then of value as a payment or security for the trust funds disposed of as aforesaid. Some of the stocks turned out of no value. Upon a bill filed against the banks at *W.* and *F.*, the widow and administratrix of *S.* and the purchasers of the stock by *R.* and *H.*, &c. to repair the injury done the trust,—*Held:*

1. That *H.*, one of the trustees, having received money and stocks on account of the trust, and being thus liable to account with the trust estate, could not as complainant be entitled to a decree without such accounting.
  2. Equity may oblige a complainant to assume the position of a defendant, that justice between the parties may be effectuated; and where the case justifies it, will decree at once without waiting for such change of position.
  3. As it did not clearly appear whether the stocks transferred by *A.* to *H.* were in payment, or by way of security, this court considered it premature to decree upon those subjects, but left them for further investigation in the Court of Chancery, as well in relation to the principal fund as the interest.
  4. The co-complainant and trustee, *R.*, may recover from the administratrix of *S.* in due course of administration, to the extent of assets which have come to her hands, such sum as he may be unable to recover from *H.*
  5. The injury which the trust estate has sustained, will be repaired by the payment of a sum equivalent to the price at which the stock was sold, when the transfer was made by *S.* and wife.
  6. Such sum should be invested for the benefit of the *c. q. t.* under the will of *L.*
  7. For *A.*'s participation in the transfer of the stock, as she was a *feme covert*, under the dominion of her husband, she incurred no penalty or forfeiture of her right as *c. q. t.* for life. She claimed nothing on account of interest; and there is no reason why the estate if repaired, may not be increased for the benefit of those in remainder. *Farmers and Mechanics Bank et al. vs. Wayman and Stockett*, 336.
35. Forfeitures are not viewed in a favorable light by a court of equity.  
*Ib.*
36. After the accounting by *H.*, and by *A.* as administratrix of *S.*, such a

COURT OF CHANCERY—*Continued.*

- sum shall not be found due from both, as with the funds in court will be sufficient to reinstate the trust estate to the amount of the stock transferred by *S.* and *A.*, then the balance necessary to accomplish this object should be paid by the two banks; and if the decree against *H.* and *A.* should be unavailing to the *c. q. t.* the amount for which they shall be decreed to pay, then the said banks ought to be held responsible for any deficiency that may occur. *Ib.*
37. Chancery will not interpose, and arrest by injunction the progress of a public improvement in a municipal corporation, upon a mere inferential and argumentative statement with reference to an essential fact omitted in the bill, necessary to establish the complainants' right to the writ. *Alexander and Wilson vs. Mayor and C. C. of Baltimore*, 383.
  38. Where an act of Assembly gave a power to a municipal corporation, to provide for opening a street, with a right of appeal, and to a trial by jury, by any party aggrieved, before an inferior tribunal, and the right of appeal was exercised, the Court of Chancery has no jurisdiction to supervise or re-examine the proceedings and judgment of the court, to which the appeal was taken. *Ib.*
  39. Courts of equity have exclusive jurisdiction in all cases where the recovery of legacies is sought from lands charged with their payment. *Crawford vs. Severson*, 443.
  40. In enforcing such liens, courts of equity, by analogy, generally adopt the statutory bar of twenty years, as a bar to relief, where the lien is of more than that standing, and where the plea of limitations or lapse of time is relied on in the defendant's answer. *Ib.*
  41. The assignee of a legatee whose legacy was a lien or charge upon land, may enforce its payment by bill in equity against the owners of the land. *Ib.*
  42. When a decree is suspended, by order of court, at the same term at which it was passed, the right to appeal commences after the suspending order is disposed of. *Bennett et al. vs. Bennett et al.* 469.
  43. Proceedings to divide the real estate of an intestate, situated in two counties, are properly had under the descent act in the Court of Chancery. They should, however, in all respects, be in conformity to the provisions of the act of 1820, ch. 191. *Ib.*
  44. The application may be made to the Court of Chancery either by bill or petition. *Ib.*
  45. When the commissioners, in such a case, did not conform to the act of 1820—nor the commission require them to pursue the provisions of that act, it is ground of error. *Ib.*
  46. A testator directed, that out of a certain portion of his real estate absolutely devised to his three children, his widow's life estate of one-third of his whole property should be allotted by certain commissioners, to be appointed by the Orphans court, and the other portion so devised to be divided among said children. The commissioners intending, under their apportionment, to carry into effect the directions

COURT OF CHANCERY—*Continued.*

and wishes of the widow and children, erroneously and contrary to such directions and wishes, made one lot subject to the widow's life estate, and assigned a lot intended by the parties, for one, to another of the devisees. *Held*, that the Court of Chancery might correct the error, reform the award, and make it conform to the directions of the parties, the tenants for life, and in remainder in fee; and, also, decree that the parties should account for rent and profits received under the erroneous award. *Baynard vs. Norris et al.* 468.

47. The widow and one of the children claiming under the erroneous award, according to its description of the property, mortgaged the same to third parties, while in fact, the children and widow were in possession and enjoyment, according to their actual understanding, and not according to the award. The mortgagees claimed the property as *bona fide* purchasers, but omitted to state in their answer that their grantor or mortgagor was at the time of the conveyance, seized or pretended to be seized, and was possessed of the mortgaged estate. *Held*, that the mortgage constituted no objection to reforming the award of the commissioners. *Ib.*
48. The fact of the possession of a party, whose rights are involved in a purchase, is a sufficient intimation of those rights, to put the purchaser upon an inquiry into their nature, and failing to make it, he is in equity visited with all the consequences of the knowledge of the title. *Ib.*
49. An order of court which directed receivers to give sixty days notice, by advertisement in three of the newspapers printed in the city of B. to all the stockholders of, &c. to pay the remaining instalments due on their stock respectively; and that if they fail to pay, according to said notice, the said receivers shall proceed forthwith to coerce the payment of the same by suit, is not to be interpreted as requiring them to call for the *whole* amount of unpaid instalments upon sixty days notice, but leaves to the receivers the power of fixing the amount of instalments called for, in conformity with the provision of the charter of any such company. *Hall vs. U. S. Insurance Company*, 484.

See DIVORCE.

PARTNER AND PARTNERSHIP, 1 to 10.

PLEADINGS IN EQUITY.

PRACTICE IN CHANCERY.

TRUSTS—TRUSTEE.

DAMAGES—MEASURE OF

See COURT OF CHANCERY, 34.

DEBTOR AND CREDITOR.

1. Where a person in one character is debtor, and the same person in another character is creditor, the law regards the debt as paid by the debtor capacity to the creditor. *Flickinger vs. Hull*, 60.
2. Our whole system regulating the relation of debtor and creditor, is designed to subject every dollar's worth of property, real, personal and mixed, to the just claims of a creditor, and so exempt the honest debtor

DEBTOR AND CREDITOR—*Continued.*

who does surrender all such property, from the grasp of a relentless creditor, who might desire to imprison his person, or weigh down his future energies by the impending burthen of his debt. *Somerville vs. Brown*, 399.

See STATE OF MARYLAND, 1, as to Priority of Payment.

## DESCENT.

1. In this State, the children of parents who die intestate, seized in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the act of 1820, ch. 191, sec. 5. *Hoffar & wife vs. Dement*, 132.

## DISTRESS.

See LANDLORD AND TENANT.

## DIVORCE.

1. Jurisdiction in cases of divorce was conferred upon the equity tribunals of this State by the act of 1841, ch. 262. *Brown vs. Brown*, 249.
2. By the 2d section of that act, the court is authorised to decree *a vinculo*, when the party complained against has abandoned the party complaining, and has remained absent from the State above five years. *Ib.*
3. By the 3d section of the same act, a divorce *a mensa et thoro* may be granted for abandonment and desertion, without regard to its duration; or the absence of the party complained against, from the State. *Ib.*
4. The act of 1844, ch. 306, repeals those portions of the 2d section of the act of 1841, ch. 262, which require absence from the State for five years, on the part of the party complained against, as a cause for a divorce, *a vinculo matrimonii*; with a proviso, that no such decree shall be passed on account of abandonment, unless the court shall be satisfied by competent proof, that such abandonment has continued uninterruptedly for at least three years, is deliberate and final, and the separation of the parties beyond any reasonable expectation of reconciliation. *Ib.*
5. When the party complained against has *not* been absent from the State, an absolute divorce against such party cannot be decreed. *Ib.*
6. Where husband and wife, through the intervention of a trustee, execute a deed of mutual separation for their joint lives, by which provision is made for the support of the wife and children, so long as the terms of it are complied with on the part of the husband, he is exonerated from the obligation to support his wife, and it is a protection to any claim which can be made upon him for supplying her even with necessities. *Ib.*
7. When after actual separation, husband and wife select their own remedy by the execution of a deed of separation, and continue to live separate, without any new circumstances transpiring to change their actual relations since the execution of such a deed, the court will not grant a decree *a vinculo matrimonii*. *Ib.*
8. Where the parties to a deed of separation placed themselves very much in the condition with respect to each other, which the law empowers the court to do by a decree *a mensa et thoro*, such a decree is unnecessary, and perhaps improper. *Ib.*



DIVISION OF ESTATES OF INTESTATES.

See COURT OF CHANCERY, 31, 32, 33, 42, 43, 44, 45.

DONATIO MORTIS CAUSA.

1. Where the widow of the deceased claimed certain bonds as donations *mortis causa*, and it did not appear affirmatively to the court at what time they were delivered by the alleged donor to his wife, whether in health, or in his last sickness, it was held she was not entitled to them as donations. *Hebb et al vs. Hebb*, 510.
2. A conversation with a dying party, which may be considered as a narrative by him of what he had done upon a former occasion, is not sufficient to establish a *donatio mortis causa*. *Ib.*
3. A *donatio mortis causa* must be with a view to the donor's death; it must be conditional, only to take effect by the death of the donor, by his existing disorder. There must be delivery of the subject of donation. These are among the essentials of a valid gift of this description. *Ib.*

DOWER.

1. Where the land of which a husband died seized, is sold by a court of equity for the payment of debts, by reason of the insufficiency of his personal estate to pay them, and his widow is a party to such proceeding; if the land is decreed to be sold free from the claim of dower, the widow would be barred of her right of dower so long as the decree remained unreversed. *Gardner vs. Miles*, 94.

See HUSBAND AND WIFE, 1.

EJECTMENT.

1. In an action of trespass upon the case, brought by a reversioner against a trespasser, the defendant obtained a warrant of resurvey to locate the acts of trespass. At the trial the surveyor testified that certain *stars*, on the plats, were placed there by him as the surveyor, to show the stumps of the trees cut by the defendant, as admitted by the defendant to the said surveyor about two years before the survey. He also proved that he was not instructed by the plaintiff to locate any particular trees or stumps, but was merely directed in general terms to locate the trespass; that there was no witness on the survey sworn as to any trespass, or that pointed out the places where the trees were cut. The surveyor did not point out the places of trespass to the defendant on the ground; nor inform him that he intended to place on the plats those particular points as designating the trespass; and also testified that he placed them there to enable him to show with certainty the places where the trees had been cut down, should he be sworn on the trial. The explanations did not mention that the plaintiff complained of trespasses at such stars. *Held*, that the surveyor was not competent to prove the stars, as the places, where the trespass complained of had been admitted to him by the defendant. *Funk vs Hughes*, 315.
2. Under issue joined in an action of trespass upon the plea of not guilty, the plaintiff may recover damages for any trespass by the defendant of the nature described in the declaration, and committed any where within the lines of the tract of land mentioned in it. *Ib.*

EJECTMENT—*Continued.*

3. But where plats are deemed requisite, it is necessary for the plaintiff to locate correctly, not only the tract of land claimed, but the spot within the lines of such tract, whereon the trespass was committed, and of which the plaintiff complains, and to such spots his proof must be confined. *Ib.*
4. Places of trespass, of which the explanations are silent, cannot be proved. *Ib.*
5. In an action of *trespass q. c. f.*, or in any action where the location of land is necessary to elucidate the matters in controversy, the issuing of a warrant of resurvey will be ordered; and the surveys and locations to be made under it are for the most part the same with those which are made in an action of ejectment, except, that they are not pleadings in the cause. The issue is not joined on the plats, but the plats are used by way of evidence and illustration in the trial of the issues joined in the pleadings. *PER DORSEY, J. Ib.*
6. If the action be trespass, and the plaintiff intends to rest his right of recovery upon *possession*, he must locate it upon the plats, or he can give no evidence thereof; and he must also locate the place where the trespass was committed.
7. On the trial he will not be permitted to prove the trespass in any other place, nor in violation of any other part of his possession, than that located. *Ib.*
8. If the defendant design to traverse the possession, and to prove the acts complained of, as committed in any other place than where the plaintiff has located them, he must make a counter-location of the plaintiff's possession, and locate the *locus in quo* as alleged by him, or he will be assumed to have admitted the possession as located by the defendant, and that the act complained of committed no where else. *Ib.*
9. If the plaintiff rely upon *title* as the basis of his right to recover, the muniments of his title must be located upon the plats, with as much particularity as if the proceeding were an action of ejectment for the recovery of the land on which the trespass was committed. *Ib.*
10. When a defendant desires to put a plaintiff upon proof of his locations, or disprove them, he must make a counter-location thereof. *Ib.*
11. Where the defendant seeks to defend himself upon the ground that the title to the *locus in quo* is in some person other than the plaintiff, he must make upon the plats the locations necessary to let in proof of such a defence. *Ib.*
12. It is a general rule, where a warrant of resurvey is issued, that all tracts of land, boundaries, possessions, lines, or *other objects*, of which a party proposes to offer testimony at the trial, should be shown to the surveyor by the witnesses to be examined at the trial, and be located on the plats. *Ib.*
13. To maintain an action of trespass upon the case by a reversioner, it is incumbent on him to make the same location of his title to the land, on which he alleges the trespass to have been committed, that he would

EJECTMENT—*Continued.*

- have been required to make had he been prosecuting an action of ejectment for the recovery thereof, in virtue of a possessory title thereto. *Ib.*
14. It is to prevent surprise, that objects, of which it is designed to give evidence of their position where a warrant of resurvey has been issued, are required to be located on the plats. *Ib.*
  15. Where the *only* notice taken by the surveyor in his *explanations* of a trespass complained of, was as follows: "2 shows where the defendant had timber cut, and is the trespass complained of by the plaintiff;" and upon the *plats* were located *A.* and several stars not far from it, the explanations and plats being offered in evidence, it is not competent to prove by the surveyor on the trial that he located the trespass at *A.* and the stars near to it, as representing the stumps of the trees cut down, from his own knowledge. *Ib.*
  16. Such explanations are defective and insufficient as respects the stars, and the defendant had a right to regard them as unmeaning marks. *Ib.*
  17. The explanations of the surveyor should so refer to and describe the locations on the plats, as that their import may be understood by the parties in the cause. If they fail to do this, such locations are of no avail to the parties at whose instance they were made, and no evidence can be admitted to sustain them. *Ib.*
  18. The offering of proof to maintain such locations would be a surprise and prejudice to him against whom they were designed to operate; the explanations and plats giving to him no admonition to prepare for any such subject of contest. *Ib.*
  19. Witnesses examined on a survey are permitted to enlarge, confirm, or explain at the trial, their testimony given on such survey. *Ib.*
  20. The object of such examination is to enable the surveyor to locate upon the plats the several objects pointed out to him by the witnesses, that the parties by the explanations and plats may be notified of the matters in controversy, and that the testimony to be taken on the trial may be the more easily understood, and applied to the subjects in controversy in the cause. *Ib.*
  21. The swearing of the witnesses on the survey is not intended for the benefit of the party against whom they are offered, and therefore he has no reason to complain of its omission. *Ib.*
  22. Witnesses sworn, or not sworn on the survey, must all be sworn on the trial, and may be there examined and cross-examined with perfect freedom,—*provided*, that when testifying on the subject of locations, their testimony be confined to such objects located on the plats, as were by them shown to the surveyor on the ground. *Ib.*
  23. The taking of depositions on the survey was designed to confer a contingent benefit on the party by whom the witnesses are produced. It is a rule of expedience, not of indispensable obligation, though it is usual. *Ib.*
  24. It is no ground for the rejection of a witness where a warrant of resurvey issues, that he was not sworn nor examined on the survey

EJECTMENT—*Continued.*

nor that his evidence would be a surprise upon the party against whom it is offered. He can give evidence of no object not located on the plats, nor of any object not shewn by him to the surveyor. In relation to such located objects, he may give proof otherwise competent. *Ib.*

25. No object located upon the plats can be established by the testimony of a witness, who has not upon the ground shown it to the surveyor. The time and occasion on which such showing takes place, is not essential to the validity of the location, or the admissibility of the evidence to sustain it, provided it takes place before the surveyor returns his plats to the court, and the location be intelligibly made thereon, and the requisite description thereof be given in the explanations. *Ib.*
26. By explanations and plats in the cause, the parties are notified of the intention to examine a witness, and of the purpose *as respects mere locations*, for which he is to be examined. Proof of locations under such circumstances can work no surprise. *Ib.*
27. It has been usual to examine the surveyor by whom the survey and plats were made, in relation to any matters occurring on the survey, or any locations intelligibly made upon the plats. *Ib.*
28. But when he undertakes to make locations resting on his own personal knowledge, not acquired by any thing transpiring on the survey, then the objects of which he is to give testimony should be as distinctly located, and the nature thereof, and the names of the witnesses, &c. by whom they are to be proven, be as fully disclosed by the explanations, as if the locations had been made upon the testimony of any sworn witness upon the survey. *Ib.*

## ELISOR.

*See* EXECUTION.

PRACTICE, 21, 22.

## ENROLMENT.

1. The act of 1729, ch. 8, was intended for the protection of creditors, and has no application to a sale of personal property *inter partes*. *Gough vs. Edelen*, 101.
2. Although a sale of personal property, of which the vendor retains possession, is void as far as the rights of creditors are concerned, unless there is a bill of sale acknowledged and recorded in the mode prescribed by that act—still it is effectual against the vendor, and all claiming under him. *Ib.*

## ESTOPPEL.

1. After a sale of land made by a sheriff, certified in his return to a writ of *rendi.*, objected to in the county court, upon a motion for a writ of *hab. fac. pos.* to put the purchaser into possession the writ was granted, and affirmed upon appeal, the legality of the sale in that cause is no longer an open question. *Penn et al. vs. Isherwood*, 206.

*See* PLEAS AND PLEADING, 6.



## EVIDENCE.

1. The determination of the question, whether necessary information was imparted to a ward or *cestui que trust* to enable him or his advisers to form a judgment of the condition of his estate, and decide whether a release is valid, renders it necessary to examine into the circumstances connected with it—the conduct and acts of the parties anterior to its execution, though occurring during the minority of the ward or *c. q. t.* *Forbes vs. Forbes*, 29.
2. Where two releases—one before arriving at age, and another within twelve days after full age, were executed—if at the time of the *first* release, the necessary information was imparted, and the examination of friends and advisers of the *c. q. t.* as to the state and condition of the trust fund was had: these must be considered as the operating causes for the *second* release at the time of its execution. *Ib.*
3. After accounts between trustee and *c. q. trusts* have been examined by the parties to a bill filed for that object by the trustee, and a release executed, where there is no proof of concealment, upon a bill filed to impeach such release, after a lapse of ten years from its execution, the trustee will not be required to produce actual proof of detailed information of what the records and accounts displayed. *Ib.*
4. Upon such a bill to impeach the release, the court will presume that the *c. q. t.* being a party to the *first* bill, filed by the trustee as aforesaid, had knowledge of every thing he was entitled to know, and proper to be known, for a right decision in regard to his release; and that therefore a dismissal of the bill upon the agreement of the *c. q. t.* several years after, with his trustee, for such dismissal, is such a recognition of his release as would amount to a confirmation of it, considering it merely as voidable. *Ib.*
5. As to effect of a decree—as collateral evidence. *Gardiner vs. Miles*, 94.
6. Where an action is brought by *A.* and the defendant's plea in bar averred, that a person of the same name was a party to proceedings in equity, described in the plea, this is inferentially stating in the plea that it is the same person. *Ib.*
7. Where the agent of the plaintiff called on the defendant for the purpose of demanding a slave, the defendant stated she had sold the slave to the plaintiff, but that she ought not to have done so without the assent of her children, and refused to deliver the property, which had always remained in her possession from the time of such alleged sale. The defendant cannot require the court to instruct the jury, that unless they believe there was a sale, made valid by delivery, or by bill of sale, duly acknowledged and recorded, the evidence was not sufficient to warrant the jury in finding a sale. *Gough vs. Edelen*, 101.
8. By the plea of *non est factum*, the plaintiff is required to prove the signing, sealing and delivery of the instrument to which the plea is interposed; those three facts constitute the affirmative of the issue. *Edelen vs. Gough*, 103.

EVIDENCE—*Continued.*

9. Whether the person appearing to be the attesting witness did subscribe his name to the instrument forms no part of that issue. *Ib.*
10. Before the act of 1825, ch. 120, the law for the benefit of the defendant required the plaintiff to prove such issue by the testimony of the subscribing witness, or account for his absence, but be the testimony of the witness what it might, the parties were then at liberty to adduce any other competent proof—tending to the establishment of the issue on their respective parts. *Ib.*
11. Where the attesting witness to an instrument proved that *E.* took her seat at the table—that he did not see her write her name—that he did not know whether, at the time of signing his name as witness, she had signed her name—that he could not say it was her hand-writing—that the instrument was not to his knowledge ever read to, or by her; this is not *prima facie* evidence of the signing, sealing and delivery of such instrument. *Ib.*
12. In an action upon a sealed note, which recited “on a settlement this day of *H*’s two notes, amounting to, &c., I fall in his debt.” Under the plea of *non est factum*, the defendant cannot give evidence of the administrator’s account of *H*’s estate, showing a settlement and overpayment of his debts before the date of the sealed note. Such evidence is irrelevant to the issue, and tended to mislead the jury. *Ib.*
13. A seal to an instrument *per se*, imports a consideration. *Ib.*
14. It is the duty of counsel, if aware of objection to the admissibility of evidence, to object to it at the time it is offered to be given—or if unapprised of such objection at the time of its offer, he must raise his objections in a reasonable time thereafter. *Dent vs. Hancock*, 120.
15. If he cross-examine the witness in regard to the inadmissible evidence, or offer testimony to contradict or explain it, a purely legal objection, which is disclosed on the face of the proof itself, the objection afterward comes too late. *Ib.*
16. The objection is equally too late when a prayer has been first made upon the evidence, or when the argument of the cause before the jury has commenced. *Ib.*
17. The rules above stated are not applicable to a case where the cause of objection depends on matters of fact, of which the party objecting has then, for the first time, acquired a knowledge. *Ib.*
18. Admissions in a conversation, made by a defendant to a witness, who was *not* the agent of the plaintiff, nor had any authority to make a demand, or to account, that he, the defendant, was liable to pay the plaintiff for the rent of property, and intended to give his note for it, is no evidence to support a count of *insimul computassent*. *Hoffar and wife vs. Dement*, 132.
19. If a contract be as well established, it imposes the same moral and equitable obligation to perform it when verbally made, as if made in writing, and the legal effect of the terms of the agreement will be the same, in the one case, as in the other. *Alexander et al. vs. Ghiselin et al.* 138.

EVIDENCE—*Continued.*

20. Courts of equity have properly required, that every agreement should be clearly and explicitly established, before it will lend its aid to enforce it. *Ib.*
21. A party cannot be injured by his opponent's offering evidence, whether competent or incompetent, to prove facts admitted by the pleadings, or the truth of which the objecting party is estopped from denying, or which the court is bound under the circumstances of the cause to assume. *Hardy et al. vs. Coe, 189.*
22. Upon the plea of payment of a judgment, the party must prove the payment of the whole judgment, and not a part thereof. *Ib.*
23. Where there is nothing more than a simple payment, and acceptance of a less sum of money, in satisfaction of a greater sum due—this will not sustain the plea of accord and satisfaction. *Ib.*
24. To entitle a debtor to exemption from the payment of his debt, either at law or in equity, he must prove a release or payment, or an agreement to receive some equivalent in satisfaction. *Gurley vs. Hiteshue, 217.*
25. In an action upon a bond, reciting the rendition of a judgment, from which the obligor, the defendant, was about to sue out a writ of error, with condition to transmit the record, &c., and prosecute the writ with effect, the defendant pleaded general performance, and the plaintiff assigned breaches in the words of the condition. The plaintiff need not produce in evidence the record of the original judgment. *Frantz vs. Smith, 230.*
26. The plea of general performance, in such case, affirms the existence of the judgment. *Ib.*
27. The condition of a writ of error bond recited, a judgment against the obligors for a sum certain, but was silent on the subject of interest, the judgment upon being produced in evidence, was for the same sum with interest; upon proof that the bond was filed in that cause, and there was no other cause between the parties at that term,—*Held*, no variance. *Ib.*
28. Parol evidence is not admissible to prove the intention of a contract under seal; but it is admissible to prove fraud, or omission by mistake only. *Young vs. Frost, et al. 287.*
29. Where there is no knowledge in the trustees of the violation of an express trust, nor in the *cestui que trusts*, no acquiescence can be imputed to them, and hence, lapse of time is no bar in favor of those guilty of such violation. *Farmers & Mech. Bank et al. vs. Wayman & Stockett, 336.*
30. S. being indebted to W., in 1839, and not having paid that debt, in 1841, made a voluntary conveyance to his daughter of certain negro slaves. The consideration stated in the deed was love and affection, as well as money paid; but no money was in fact paid. There was no proof in the cause tending to prove an express delivery of the slaves, by the father to his daughter, at any time prior to the execution of the deed in 1841. In 1842, W., recovered judgment against S., and levied a *fieri facias* upon the slaves in question: and the daughter

EVIDENCE—*Continued.*

claiming as well by parol gift from her father as by his deed, sued out an injunction to prevent a sale. The answer impeached the deed of 1841, as made by an insolvent grantor, and as fraudulent and void. *Held* :

1. Under the act of 1763, ch. 13, the delivery of slaves, the subject of a parol gift, must be express, and made at the time of the gift.
  2. That the title of the daughter, who claimed the injunction, depended entirely upon the deed of 1841.
  3. Under the statute of 13 *Eliz.*, ch. 5, an indebtedment by a grantor at the time of the voluntary conveyance made, is *prima facie* only, and not conclusive evidence of a fraudulent purpose, with respect to a prior creditor.
  4. This presumption may be repelled by showing that the grantor, or donor at the time of the gift, was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations; and that the settlement impeached was a reasonable provision for his child, according to his or her station and condition in life. *Worthington & Anderson vs. Shipley*, 449.
  31. Payment of instalments, by a transferee of stock, is evidence of his assent to the transfer to him. *Hall vs. U. S. Ins. Co.*, 484.
  32. Proceedings in equity against an insolvent corporation, to have receivers appointed, and unpaid instalments, due from corporators collected; the court appointed them with orders to coerce payment. In an action at law against a delinquent stockholder, such proceedings are evidence against him, though not a party to the bill, for the purpose of showing by what authority the action was prosecuted. *Ib.*
  33. Stockholders in chartered companies, bound to pay instalments as called for upon notice from such companies, are effected by notices published in the newspapers where the companies transact their business. They cannot require personal notice, and where receivers are appointed to collect the sums due from them, they possess the powers of the directors of such companies, as given by their charters in such cases, both as to time of payment, and amounts called in. *Ib.*
  34. The substitution of such newspaper publications, in lieu of personal notice, has so long been an universal usage, and of a notoriety equal to that of newspapers themselves, that the custom of doing so has become a part of the law of the land. *Ib.*
  35. A conversation with a dying party, which may be considered as a narrative by him of what he had done upon a former occasion, is not sufficient to establish a *donatio mortis causa*. *Hebb vs. Hebb*, 510.
- See* EJECTMENT, as to evidence in that action and under warrants of Recovery, and as to locations.

## EXECUTION.

1. Since the act of 1831, ch. 141, after the term of office of the sheriff who made a sale under a *fi. fa.* or *rendi.* shall have terminated, the writ of *hab. fac. pos.* may be issued to any succeeding sheriff, coroner



EXECUTION—*Continued.*

or elisor, provided the other provisions of the law are complied with.  
*Penn et al. vs. Iskerwood*, 206.

2. A *venditioni exponas* is ordinarily issued to the sheriff who levied the *feri facias*. He has a qualified property by virtue of the levy. *Ib.*
3. Where a writ of *hab. fac. pos.* strictly pursues the return of the sheriff's levy and sale under a writ of *fi. fa.*, and the return to the writ of possession certifies the delivery of the land described in that process, it cannot be objected that the latter writ commands the delivery of more land than was sold. *Ib.*

See INSOLVENT DEBTOR, 10, 11.

LIEN, 1, 2, 3.

PAYMENT, 6.

PRACTICE, 27, 28.

## EXECUTOR AND ADMINISTRATOR.

1. Upon an application for letters of administration, the Orphans court can only regard the party making them as any other citizen, notwithstanding such party may have voluntarily taken upon himself vows of seclusion from the world. *Smith and wife vs. Young*, 197.
2. The party applying for administration, and not the Orphans court, is to judge whether he can, consistently with vows he may have taken, discharge the duties of administrator. *Ib.*
3. The law requires of all who administer upon the estate of a deceased person, bond with ample security for the faithful performance of the duties they undertake. *Ib.*
4. Of the religious or other engagements of such parties, the Orphans court need not be informed, and issues designed only to give such information, ought not to be framed and sent to a county court. *Ib.*
5. By the act of 1798, ch. 101, sub ch. 5, sec. 19, it is declared, that in the grant of letters of administration "a *feme sole* shall be preferred to a married woman in equal degree." This rule is applicable to the children of the intestate, and is not to be connected exclusively with those sections of that sub chapter, which relate to the grant of letters to collaterals. *Ib.*
6. In the cases spoken of in the 10th and 23d sections of sub ch. 5, 1798, ch. 101, administration is to be granted in the discretion of the Orphans court. *Ib.*
7. The 10th sec. relates to cases where there is a widow and a child. *Ib.*
8. An intestate left a son, minor children, and a married and an unmarried daughter. The son was disqualified; and as between the daughters, the unmarried is to be preferred to the married daughter, in the grant of letters of administration upon the father's estate. *Ib.*
9. Upon a single bill payable to *W.*, administrator of *R.*, the administrator of *W.* may declare and recover against the obligor. *West vs. Chapel*, 228.
10. The administrator *de bonis non* of *R.* would have no right to such a single bill, until the Orphans court, under the act of 1820, ch. 74, sec. 3,

EXECUTOR AND ADMINISTRATOR—*Continued.*

upon application, had directed the administrator of *W.* to deliver such bill to him. *Ib.*

11. That act impliedly clothed the Orphans court with authority to enquire, as preliminary to such an order, into the fact, whether the property claimed was or not administered. Until the order was passed, the title to the bill remained in the executor or administrator of the deceased administrator, the obligee. *Ib.*
12. But even after an order for the delivery of such a single bill, a suit upon it must be brought in the name of the legal representative of the obligee, for in him the legal title would remain; no authority being given by the act to sue in any other name. *Ib.*
13. If the fund represented by the single bill had been administered, it would be unjust to the obligee's estate to order it to be delivered up to the administrator *de bonis non* of *R.* *Ib.*

See COURT OF CHANCERY, 34.

LEGACY, 1, 2, 3.

## FORFEITURE.

See COURT OF CHANCERY, 35.

## FORNICATION.

See ILLEGITIMATE CHILDREN.

## FRAUD.

1. A voluntary conveyance, made by a donor loaded with debt, involved with embarrassments, approximating to insolvency, or of the owner of an estate not adequate to the payment of the claims against him, is fraudulent and void, against a prior creditor seeking to impeach it. *Worthington and Anderson vs. Shipley*, 449.
2. The word "*voluntary*" is not to be found in the statute of 13 *Eliz.*, ch. 5, Deeds founded upon a good consideration, if made *bona fide*, are expressly excepted from its operation. Its provisions are directed against transfers concocted in fraud, and fabricated and devised by the debtor, for the purpose of delaying and defrauding his creditor. *Ib.*
3. The case of *Reade vs. Livingston*, 3 *John. C. R.* 481, erroneous as to the exposition given to the statute, 13 *Eliz.* ch. 5. *Ib.*
4. To claim a right of discount or set-off, is not an obligation or duty on the part of him who is entitled to it. He may waive or assert it at his election. Having once waived it, and thereby obtained a dividend out of the effects of his debtor, to which, neither at law nor in equity, would he otherwise have been entitled, he will not afterwards be permitted to assert his claim by way of discount or set-off. To suffer him to do so, would, in contemplation of law, if not in fact, be practising a fraud upon the other creditors of his debtor. *Hall vs. U. S. Insurance Company*, 484.

See COURT OF CHANCERY, 4 to 9.

PRACTICE IN CHANCERY, 11.

SALES OF PERSONAL PROPERTY, 1, 2, 3.

SPECIFIC EXECUTION, 4, 5, 6.

## GENERAL RULES OF LAW.

See MAXIMS.

## GIFTS OF SLAVES.

1. *S.* being indebted to *W.*, in 1839, and not having paid that debt, in 1841, made a voluntary conveyance to his daughter of certain negro slaves. The consideration stated in the deed was love and affection, as well as money paid; but no money was in fact paid. There was no proof in the cause tending to prove an express delivery of the slaves, by the father to his daughter, at any time prior to the execution of the deed in 1841. In 1842, *W.* recovered judgment against *S.*, and levied a *fieri facias* upon the slaves in question: and the daughter claiming as well by parol gift from her father as by his deed, sued out an injunction to prevent a sale. The answer impeached the deed of 1841, as made by an insolvent grantor, and as fraudulent and void. *Held*,
  1. Under the act of 1763, ch. 13, the delivery of slaves, the subject of a parol gift, must be express, and made at the time of the gift.
  2. That the title of the daughter, who claimed the injunction, depended entirely upon the deed of 1841. *Worthington & Anderson vs. Shipley*, 449.
2. Under the provisions of the act of 1763, ch. 13, it is essential to the validity of a parol gift of a slave, that there should be an express delivery of the property at the time, and in pursuance, of the gift. The act is not gratified by a constructive delivery, nor by an actual and express delivery, if it does not accompany the gift. *Anderson & Worthington vs. Hammond*, 449.

## GUARDIAN AND WARD.

1. A release executed by a ward, or *cestui que trust*, shortly after he attains age, without the necessary accounts or information from which a judgment may be formed of the condition of the estate, would not meet the favor of a court of equity. *Forbes vs. Forbes*, 29.
2. Where a guardian dies insolvent, and his surety is appointed his successor, and charges himself with the balance due the ward from the first guardian, this makes the second guardian liable to the ward. *Flickinger vs. Hull*, 60.

## HABERE FACIAS POSSESSIONEM.

See EXECUTION.

PRACTICE, 20, 25.

## HUSBAND AND WIFE.

1. In the absence of any agreement between partners direct or implied, impressing upon their real estate the character of personalty, the true rule is that the interest of a deceased partner in the partnership lands, is to be treated as real estate, and that his widow is entitled to a suitable allowance out of the proceeds of the sale of the partnership lands, as an equivalent for her dower, provided the partnership shall be found to have been solvent at the period of its dissolution. *Goodburn and wife vs. Stevens et al.* 1.

See DIVORCE.

## ILLEGITIMATE CHILDREN.

1. The acts of 1781, ch. 13, and its supplements, are final in their character, and supersede the former laws punishing the offence of fornication. *Oldham vs. State*, 60.
2. The proceedings under those acts are treated by the law as criminal proceedings. *Ib.*
3. Under the act of 1796, ch. 34, the mother or other person maintaining the child, may obtain the fruits of the recognizance required to be taken in such cases. They are substituted for the country, but this does not at all change the character of the proceeding. *Ib.*
4. The father of an illegitimate child committed under a *ca. sa.*, for violation of his recognizance to maintain the child, cannot relieve himself by application under the insolvent laws. *Ib.*
5. Where the recognizance to indemnify the county for the support of an illegitimate child becomes insufficient by reason of the insolvency of the security, the county court may order the father to enter into a recognizance, and no appeal lies from such an order. *Ib.*

## INFANCY—INFANTS.

See COURT OF CHANCERY, 4 to 9, 23, 24, 31, 37, 38.

## INJUNCTION.

1. It is proper as a general rule, very rarely, if ever, to be departed from, that an injunction bond should be required, when an application is allowed that delays the recovery or receipt of money, or which lessens, or in any respect endangers, any existing securities, or renders liable to loss thereby, any money, profits, or property, which the adverse party is by injunction prevented from receiving or enjoying. *Alexander et al. vs. Ghiselin et al.* 138.
2. Where a judgment creditor had sued out execution, and levied it upon the personal property of the defendant, who afterwards applied for relief under the insolvent laws, and a trustee was duly appointed, upon a bill filed by other creditors of the insolvent claiming a specific lien by way of mortgage on such property, and the insolvent's trustee, for an injunction to arrest the sale of the property by the sheriff. *Held*, that the complainants were entitled to such injunction, but that a bond should have been filed and approved before it issued. *Ib.*
3. In general, where an injunction issues without bond, the defendants may petition for an order of court, requiring bond to be given by a reasonable period, or on default, to have the injunction dissolved. *Ib.*
4. But when the answers have come in, and they show on their face a case for a perpetual injunction, and the continuance of the writ was not dependent upon a question of law or fact to be established, it would be wholly unnecessary to require a bond. *Ib.*

See PRACTICE IN CHANCERY, 1.

## INSOLVENT DEBTOR.

1. A vendor of land not being paid the price in full, made a conveyance to his vendee, who afterwards became a bankrupt under the laws of *The*



INSOLVENT DEBTOR—*Continued.*

*United States.* The vendor then filed his bill in equity to enforce his lien for the balance due him, against a purchaser, with notice from the assignee of the bankrupt. *Held*, that the vendor would have had full remedy in the case in the District Court of the *United States*, as an incumbrancer on the premises sold, and that the title of the purchaser from the assignee could not be disturbed under this bill. *Wilson vs. Turpin*, 56.

2. The assignee has authority to administer the assets of a bankrupt, whether real or personal, and especially to sell mortgaged estates, and of course, to pass a title to the purchaser in every case where the jurisdiction of the State Court had not attached. *Ib.*
3. An appeal will not lie from an order of the county court, made in proceedings under the act relating to insolvent debtors, refusing to associate another trustee with the permanent trustee of the insolvent, nor ordering a sale made by such trustee to be ratified and confirmed. *Williams vs. Williams*, 84.
4. Creditors injured by the misconduct of the permanent trustee of an insolvent, have a remedy in the proper *forum*, and proper form, upon his bond for the discharge of his duty. *Ib.*
5. The trustee of an insolvent debtor cannot appeal from an order of the county court, before which the application of the insolvent is depending, directing him to sell the right and title of the insolvent to certain stock mentioned in his schedule of effects. *Williams vs. Williams*, 88.
6. Such an appeal is not authorized by any act of assembly; and it is not a case either at law, or in equity. *Ib.*
7. The father of an illegitimate child committed under a *ca sa*, for violation of his recognizance to maintain the child, cannot relieve himself by application under the insolvent laws. *Oldham vs. State*, 90.
8. Under the act of 1805, ch. 110, and its supplements, the trustee of an insolvent is not restricted in his sales to what he has in actual possession. Property in the hands of a tenant, a bailee, or a trespasser, or mortgagee of more value than the debt, may be sold. *Alexander et al. vs. Ghiselin et al.* 138.
9. The design of the 7th section of that act was to allow full force and effect to an execution levied, as a lien or incumbrance, in connection with which words, the process is mentioned, but not to determine nor indicate by whom the sale was to be made. *Ib.*
10. The act of 1805 and its supplements, require the trustee to take into his possession all the estate and effects to which the insolvent had *the right of possession* at the time of his application, and to sell and dispose of *all* his property in possession, reversion or remainder, and pay off the liens and incumbrances thereon, and to regard an execution as a lien upon personal property, only in the case where it was actually levied before the insolvent's petition. *Ib.*
11. In the case of the personal estate, it secures to the execution creditor a priority over all judgments not in the same condition, by making his debt a specific lien on the property seized in execution. *Ib.*

INSOLVENT DEBTOR—*Continued.*

12. The law has given to the trustee the entire management of the estate, subject to the control of the court by whom he is appointed ; charging him with the duty of paying off liens and incumbrances, to which the estate might be subject. *Ib.*
13. Our whole system regulating the relation of debtor and creditor, is designed to subject every dollar's worth of property, real, personal and mixed, to the just claims of a creditor, and so exempt the honest debtor who does surrender all such property, from the grasp of a relentless creditor, who might desire to imprison his person, or weigh down his future energies by the impending burthen of his debt. *Somerville vs. Brown*, 399.
14. Upon a contract made with a citizen of *Maryland*, out of this State, to be performed in another State, by a citizen of another State, a discharge, obtained under the insolvent laws of *Maryland*, cannot affect the right of the creditor to an absolute and unqualified judgment in the courts of this State, and to place his execution upon any property of the insolvent debtor, to be found undistributed in the hands of his permanent trustee, under our insolvent system. *Larrabee vs. Talbott*, 426.
15. The decisions of the Supreme Court of the *United States*, upon all questions of constitutional law, are to be received as conclusive. *Ib.*
16. The late bankrupt law of the *United States* was enacted on the 19th August, 1841. It expressly provided that it should take effect only from and after the 1st February, 1842. This is equivalent to declaring that it should have no effect until that day, and hence it did not suspend the operation of the State insolvent laws until that day. *Ib.*

See *BILLS OF EXCHANGE*, 4, 5, 6, 7.

## JUDGMENT.

1. The defendant, in a *scire facias*, by the plea of *nul tiel record*, may avail himself of the fact, that the judgment on which the *sci. fa.* is founded, was interlocutory. *Clark vs. Digges*, 109.
2. Where a *scire facias* is not defective on its face, but states a good judgment, the motion to quash will not avail a party who desires to show, that by the error of the clerk, an interlocutory had been treated as a final judgment. *Ib.*
3. A "judgment" entered on the docket, "for \$12,000, penalty and costs : to be released on the payment of——" is not interlocutory. It indicates a judgment, by confession, for the penalty ; to be released upon the payment of such sum as might thereafter be agreed upon ; and that it is not a binding judgment, until the sum shall be ascertained, as originally contemplated. *Ib.*
4. In determining the character of a judgment, this court can only look to it as extended by the clerk of the county court ; whether it has been properly extended by the clerk, cannot be enquired into by this court collaterally. *Ib.*
5. With regard to the force and legal effect to be attributed to a domestic

**JUDGMENT—Continued.**

judgment, there is no distinction between a judgment of condemnation rendered in an attachment on warrant, in a case where the requisitions of the attachment laws have been complied with, and a judgment *in personam*. *Gordon, Ex. of Gordon, vs. M. & C. C. of Baltimore*, 231.

See ASSUMPSIT, 3.

PRACTICE, 20.

**JURISDICTION.**

See ASSUMPSIT, 3.

COURT OF CHANCERY, 10, 13, 14, 31, 37, 38.

DIVORCE, 1.

PLEAS AND PLEADING IN EQUITY, 2, 4 to 3.

PRACTICE IN CHANCERY, 16.

PRACTICE IN THE COURT OF APPEALS, 1, 2, 3.

**LANDLORD AND TENANT.**

1. To levy a distress, a landlord for the purpose of making it, and not acting in conformity to the statute on the subject, is not authorized to break open and enter the door of a barn which is barred or bolted, with a view to prevent from without, an entry thereat. *Dent vs. Hancock*, 120.
7. But if the door be not so bolted or barred, or is simply shut or latched, with the ordinary means of raising the latch left on the outside of the door, then is an entry at such door lawful to make a distress for rent. *Ib.*
3. And if a door so bolted or barred, be forcibly broken open by a person not acting under the authority or sanction, or at the instance of the landlord, or his bailiff, the person required to make such distress, is authorized to enter for that purpose at the door thus forcibly broken open. *Ib.*
4. When the relation of landlord and tenant existed to the end of the year 1843, the rent was in arrear, and the landlord in 1844, had rented the premises to another person; but the first tenant had locked up a quantity of tobacco in a barn on the premises, which the landlord had taken as a distress: the fact that the tenant was not in possession of the demised premises when the distress was levied, would not make the entry for the purpose of a distress lawful. *Ib.*
5. The landlord has no authority forcibly to break open a door, for the purpose of levying a distress, though property be fraudulently deposited in the house to prevent a distress. *Ib.*
6. The statute 11 *Geo. 2*, ch. 19, gives no warrant for such a proceeding. *Ib.*
7. *J.* died seized of a tract of land, leaving four children his heirs-at-law. *N.* without authority, sold the land to *D.*, who entered upon it and used it. The same land was afterwards sold under decree by *N.* to *D.* In an action for use and occupation by one of the heirs of *J.*, to recover her portion of the rent between the period of the two sales, it appeared that *D.* had admitted his obligation to pay rent or interest on the purchase money, and promised to execute his note for the separate inter-

LANDLORD AND TENANT—*Continued.*

est of the plaintiff on such rent. Held, that as *D.* entered under the contract of purchase, and not under any agreement or demise with the heirs of *J.*, jointly or severally, to pay rent, this action could not be maintained. *Hoffar & wife vs. Dement*, 132.

8. In the action for use and occupation, the relation of landlord and tenant must be established between the plaintiff and defendant. *Ib.*

## LAPSE OF TIME.

See EVIDENCE, 29.

LEGACY, 5.

## LEGACY.

1. The testator devised to his son *J.* his home plantation in fee, and to his son *S.* another plantation, in fee. To his daughter he devised \$1,000, of which \$600 was to be paid by *J.* and \$400 by *S.* at the expiration of three years from the testator's death, on his attaining full possession, which ever may last happen; with two years interest from *J.* and *S.* The rest and residue of his estate he devised absolutely to his two sons. Held, that the legacy to the daughter was a charge upon the land devised to the sons on the proportions of three-fifths and two-fifths. *Crawford vs. Severson*, 443.
2. Such a bequest is not payable as legacies ordinarily are out of the personal estate, but is to be paid by the two sons, and *quoad hoc* the lands were held by them in trust. *Ib.*
3. If a testator direct a particular person to pay a legacy, in the absence of all other circumstances, he is presumed to intend him to pay it out of the funds with which he is intrusted. *Ib.*
4. Courts of equity have exclusive jurisdiction in all cases where the recovery of legacies is sought from lands charged with their payment. *Ib.*
5. In enforcing such liens, courts of equity, by analogy, generally adopt the statutory bar of twenty years, as a bar to relief, where the lien is of more than that standing, and where the plea of limitations or lapse of time is relied on in the defendant's answer. *Ib.*
6. The assignee of a legatee whose legacy was a lien or charge upon land, may enforce its payment by bill in equity against the owners of the land. *Ib.*

## LEX LOCI CONTRACTUS.

See CONTRACT, 10, 11.

## LIEN.

1. The act of 1805 and its supplements, require the trustee to take into his possession all the estate and effects to which the insolvent had *the right of possession* at the time of his application, and to sell and dispose of *all* his property in possession, reversion or remainder, and pay off the liens and incumbrances thereon, and to regard an execution as a lien upon personal property, only in the case where it was actually levied before the insolvent's petition. *Alexander et al. vs. Ghiselin et al.*, 138.



**LIEN—Continued.**

2. In the case of the personal estate, it secures to the execution creditor a priority over all judgments not in the same condition, by making his debt a specific lien on the property seized in execution. *Ib.*
3. The law has given to the trustee the entire management of the estate, subject to the control of the court by whom he is appointed; charging him with the duty of paying off liens and incumbrances, to which the estate might be subject. *Ib.*

See LEGACY, 1 to 6.

**LIMITATION OF ACTIONS.**

See COURT OF CHANCERY, 40.

**LOCATIONS.**

See EJECTMENT.

**MAYOR AND CITY COUNCIL OF BALTIMORE.**

1. The right to tax bank stock was not imparted to the city of *Baltimore* for the first time by the act of 1841, ch. 23. *Gordon's Ex. vs. M. and C. C. of Baltimore*, 231.
2. The act incorporating the city of *Baltimore*, granted the taxing power in the most comprehensive terms, without any limitation as to the objects on which the power was to operate, and was confirmed by the act of 1817, ch. 148, as to property within the city. *Ib.*
3. The act of 1821, ch. 131, sec. 11, did not restrain the city of *Baltimore* from taxing bank stock within her corporate limits; such an intention is not clearly expressed in that act. *Ib.*
4. The stipulation in the act of 1821, not to impose any further tax upon the banks mentioned in it, during the continuance of their charters, was intended to protect the banks against any additional tax for twenty years, which might be imposed by the legislature for State purposes. The terms further tax, under the circumstances, have no application to the city of *Baltimore*. It was not intended to exempt the banks there situated from all taxation. *Ib.*
5. The intention of the act of 1841, ch. 23, was to subject the stock of the banks to both State and city taxation. In relation to the State, this was a violation of the act of 1821. The right of the city to tax the stock, is unaffected by any constitutional inhibition. *Ib.*
6. The act of 1838, ch. 226, enacted that the *M. and C. C. of Baltimore* should have full power to provide for laying out, opening, extending, &c., in whole or in part, any street, &c. within the bounds of said city, which in their opinion the public welfare or convenience may require; to provide for ascertaining whether any, and what amount, in value of, *damage* will be caused thereby, and what amount of *benefit* will thereby accrue to the owner, &c. of any ground within or adjacent to said city, for which such owner &c. ought to be compensated, or ought to pay compensation, and to provide for assessing and levying either *generally* on the whole assessable property within the said city, or *specially* on the property of persons benefited, the whole or any part of the amount of damages and expenses which might be incurred; to

MAYOR AND CITY COUNCIL OF BALTIMORE—*Continued.*

provide for granting appeals to *Baltimore City Court*, from decisions of any commissioners who might be appointed under the authority of the city, &c. securing a review of the assessment by a jury. *Held*, that this act was a constitutional exercise of legislative power, and all proceedings of the city in conformity to it valid. *Alexander & Wilson vs. M. and C. C. of Balt.* 383.

7. The power of appropriating to a public use the property of individuals, when public necessity or utility requires it, upon securing to the party whose property is sacrificed, a just compensation for any injury he may sustain, resides in the State as a portion of its inherent sovereignty. *Ib.*
8. It is this supreme power over the property of individuals which enables the State to confer upon our subordinate jurisdictions, both municipal and judicial, the right to take private property, for the purpose of opening streets and roads, when in their opinion it is demanded by the public welfare and convenience, adequate provision being made for indemnification. *Ib.*
9. The ordinance of the city of *Baltimore*, of the 9th March, 1841, passed to carry into effect the powers granted by the act of 1838, ch. 226, directed the commissioners, after ascertaining the amount of damages and expenses to be incurred in any case, to assess the same on all the ground and improvements within the city, the owners of which, as such, the said commissioners should decide to be benefited by accomplishing the object authorized in the said ordinance—apportioning them in just proportion, according to the value of the benefit, which, in the estimation of the said commissioners, will accrue to each owner of any right or interest claimed in any such ground or improvements—does not subject the individuals embraced by it to an unequal and partial tax, for the prosecution of an improvement in which the whole community is interested. *Ib.*
10. No burden is imposed by such an ordinance on the person on whom it operates. It is a mere requisition that the owners of property, the value of which is enhanced by the opening of the street, shall pay for the improvement in a ratio to the benefit derived from it. *Ib.*
11. Extravagant estimates of benefits in such cases may be corrected upon appeal, and by a contest before a jury, which is secured to an aggrieved party. *Ib.*
12. Assessments equivalent to benefits derived in such cases are equitable. *Ib.*
13. The ordinance in question exempted certain property, as not benefited, from the assessment to be made under it. If it had appeared in fact, that the property so exempted was benefited, then the ordinance would be void. *Ib.*

*See* VOLUNTARY PAYMENT, 1, 2.

## MAXIMS AND GENERAL RULES OF LAW.

1. Where a man has several capacities, and is found in possession of property, the law will attach the possession to the capacity in which of right it ought to be held. *Flickinger vs. Hull*, 60.
2. So also, where having different capacities, he executes an authority

MAXIMS AND GENERAL RULES OF LAW—*Continued.*

delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the person does not profess to exercise it in virtue of that particular power. *Ib.*

3. The rule that equity regards as done that which was agreed to be done, is part of our law. The instances in which it has been enforced, and against the very terms of the registry acts, are numerous. *Alexander et al. vs. Ghiselin et al.*, 138.

See PRESUMPTION OF LAW AND FACT.

## MISTAKE.

See COURT OF CHANCERY, 46, 47.

## MORTGAGE, MORTGAGOR AND MORTGAGEE.

1. An agreement to mortgage personal property alone, to secure a debt due from one contracting party to the other, to be performed forthwith, is not affected by the statute of frauds; but if it had also related to land, it would have been within its operation. *Alexander et al. vs. Ghiselin et al.*, 138.
2. An equitable mortgage may be enforced against others than the contracting party. *Ib.*
3. Although the exception in the act of 1729, ch. 8, sec. 5, is broad enough in terms to defeat a *bona fide* purchaser, who has paid his money on the faith of a legal transfer or security, to be forthwith executed, if the rights of a creditor should happen to intervene; still it is not always to have that construction, but has been so considered in equity, as to avoid many of the inconveniences which a literal interpretation of it would inflict. *Ib.*
4. A testator directed, that out of a certain portion of his real estate absolutely devised to his three children, his widow's life estate of one-third of his whole property should be allotted by certain commissioners, to be appointed by the Orphans court, and the other portion so devised to be divided among said children. The commissioners intending, under their apportionment, to carry into effect the directions and wishes of the widow and children, erroneously and contrary to such directions and wishes, made one lot subject to the widow's life estate, and assigned a lot intended by the parties, for one, to another of the devisees. *Held*, that the Court of Chancery might correct the error, reform the award, and make it conform to the directions of the parties, the tenants for life, and in remainder in fee; and, also, decree that the parties should account for rent and profits received under the erroneous award. *Baynard vs. Norris et al.* 468.
5. The widow and one of the children claiming under the erroneous award, according to its description of the property, mortgaged the same to third parties, while in fact, the children and widow were in possession and enjoyment, according to their actual understanding, and not according to the award. The mortgagees claimed the property as *bona fide* purchasers, but omitted to state in their answer that their grantor or mortgagor was at the time of the conveyance, seized or pretended to be seized, and was possessed of the mortgaged estate.

**MORTGAGE, MORTGAGOR AND MORTGAGEE—Continued.**

*Held*, that the mortgage constituted no objection to reforming the award of the commissioners. *Ib.*

**NEGROES AND SLAVES.**

*See* GIFTS OF SLAVES.

**NOTICE ARISING FROM POSSESSION.**

*See* PURCHASER, 1.

**NOTICE BY NEWSPAPER PUBLICATION.**

*See* CORPORATIONS, 8, 9, 10.

**ORPHAN'S COURT.**

1. Under the act of 1798, ch. 101, sub ch. 15, sec. 17, either party may apply to the Orphans court for issues to be sent to the county court, if there be any matters properly in issue between the parties to a contest upon plenary proceedings. *Smith and wife vs. Young*, 197.
2. Whether there are any such matters in issue, the court will determine as a question of law. *Ib.*
3. No person by vows of any description, can exempt himself from any of the duties which the State may require of him, nor forfeit any of the rights of citizens, which, but for the vows, would have belonged to him. *Ib.*
4. Upon an application for letters of administration, the Orphans court can only regard the party making them as any other citizen, notwithstanding such party may have voluntarily taken upon himself vows of seclusion from the world. *Ib.*
5. The party applying for administration, and not the Orphans court, is to judge whether he can, consistently with vows he may have taken, discharge the duties of administrator. *Ib.*
6. The law requires of all who administer upon the estate of a deceased person, bond with ample security for the faithful performance of the duties they undertake. *Ib.*
7. Of the religious or other engagements of such parties, the Orphans court need not be informed, and issues designed only to give such information, ought not to be framed and sent to a county court. *Ib.*
8. By the act of 1798, ch. 101, sub ch. 5, sec. 19, it is declared, that in the grant of letters of administration "a *feme sole* shall be preferred to a married woman in equal degree." This rule is applicable to the children of the intestate, and is not to be connected exclusively with those sections of that sub chapter, which relate to the grant of letters to collaterals. *Ib.*
9. In the cases spoken of in the 10th and 23d sections of sub ch. 5, 1798, ch. 101, administration is to be granted in the discretion of the Orphans court. *Ib.*
10. The 10th sec. relates to cases where there is a widow and a child. *Ib.*
11. An intestate left a son, minor children, and a married and an unmarried daughter. The son was disqualified; and as between the daughters, the unmarried is to be preferred to the married daughter, in the grant of letters of administration upon the father's estate. *Ib.*



ORPHAN'S COURT—*Continued.*

12. If a fund represented by a single bill had been administered, it would be unjust to the obligee's estate in the Orphan's court to order it to be delivered up to the administrator *de bonis non* of R. *West vs. Chappell*, 228.
  13. An appeal will not lie from an order of the Orphans court, refusing to revoke letters testamentary. *Hebb vs. Hebb*, 510.
- See EXECUTOR AND ADMINISTRATOR.  
PLEAS AND PLEADING, 15, 16.

PAYMENT.

1. Upon the plea of payment of a judgment, the party must prove the payment of the whole judgment, and not a part thereof. *Hardey et al. vs. Coe, &c.* 189.
  2. Where a partial payment, as a compromise, is of such a character as to bar the plaintiff's right to recover, it ought to be pleaded by way of accord and satisfaction, and not as a payment. *Ib.*
  3. Where there is nothing more than a simple payment, and acceptance of a less sum of money, in satisfaction of a greater sum due, this will not sustain the plea of accord and satisfaction. *Ib.*
  4. Payment of a part of an admitted debt is neither in law nor equity a good consideration for abandoning all claim to the residue. It is only a discharge *pro tanto*. *Gurley vs. Hiteshue*, 217.
  5. To entitle a debtor to exemption from the payment of his debt, either at law or in equity, he must prove a release or payment, or an agreement to receive some equivalent in satisfaction. *Ib.*
  6. Where a creditor after an execution levied, gives a release or receives payment of his judgment, that defence would be properly made in the court of law, at the return of the execution, and no where else. *Ib.*
- See ASSUMPSIT, 3.

VOLUNTARY PAYMENT.

PARTNERS—PARTNERSHIP.

1. Although a partnership be fixed for a particular term, yet it is understood as an implied condition or reservation, unless the contrary is expressly stipulated, that it is dissolved by the death of either of the partners, at any time within the period. *Goodburn and wife vs. Stevens et al.* 1.
2. Where a partner died in 1825, and his administratrix and widow in 1830 filed her bill, charging that the personal property of her husband had been employed in the business of the partnership by the defendants, and prayed that they may be compelled to account for the profits made since her husband's death out of the personal property, it was her right, at her election, to demand either the actual profits made by the survivors from the use of her husband's share of the partnership property, or interest upon the capital thus employed. *Ib.*
3. Such being her right, the assertion of it cannot be justly regarded as evidence of an assent on her part to the continuation of the partnership, so as to implicate her as a partner;—or as a ratification of the acts of the surviving partners. *Ib.*

PARTNERS—PARTNERSHIP—*Continued.*

4. Surviving partners who show by their answer to a bill filed for an account by the administratrix of a deceased partner, that they never consented to receive her as a partner after the death of her intestate, and acknowledge their liability to account, cannot claim to have the partnership accounts brought down to a period subsequent to the dissolution caused by death. *Ib.*
5. When a partnership is dissolved by death of a partner, the accounts are to be taken at that time, for the purpose of ascertaining the condition of the partnership, and the rights of the respective partners to the joint property. *Ib.*
6. Where it appeared that real estate had been used by a partnership for a long series of years in the manufacture of iron, and that upon the death of any partner, his heirs at law, to whom the land descended, came into the partnership in his place, and there was no proof of any articles of partnership, it was held, that the whole partnership estate, whether consisting of real or personal property, was to be regarded in equity as a consolidated fund to be appropriated primarily and exclusively to the satisfaction of partnership debts. *Ib.*
7. In the absence of any agreement between partners direct or implied, impressing upon their real estate the character of personality, the true rule is that the interest of a deceased partner in the partnership lands, is to be treated as real estate, and that his widow is entitled to a suitable allowance out of the proceeds of the sale of the partnership lands, as an equivalent for her dower, provided the partnership shall be found to have been solvent at the period of its dissolution. *Ib.*
8. The doctrine that real estate purchase with the partnership funds for its use, and on its account, is to be regarded in a Court of Equity, as the personal estate of the company for all the purposes of the company, stands upon the familiar and just principle of constructive trust, resulting from the relation which the partners bear to each other, and from the fact, that the estate was brought into the firm, or purchased with the funds of the partnership for the convenience and accommodation of the trade. *Ib.*
9. Upon the death of a partner, the legal estate of which he was seized as tenant in common passes to his heirs or devisees, clothed with a similar trust in favor of the surviving partners, until the purposes for which it was acquired have been accomplished. *Ib.*
10. When the partnership accounts are fully and finally settled, in the absence of an express or implied agreement to convert the real into personal estate, no solid reason can be assigned, why the real estate should not be treated in equity, as at law, according to its real nature, and chargeable with the widow's dower. *Ib.*
11. The complainant, admitted into a partnership which had previously existed, as a partner, is not responsible for its previous debts. *White et al. vs. White*, 359.
12. A dissolution of a partnership may be brought about in various ways,

**PARTNERS—PARTNERSHIP—***Continued.*

and among others by a withdrawal of one of several partners from its business. *Ib.*

13. The partners, who retire, may affirm that a bill is to burthen them with expenses which they are not bound to incur; to swell the pleadings with the state of the several claims, which they cannot be said to have any connection after they respectively withdrew. *Ib.*

**PLEAS AND PLEADING.**

1. Filing additional pleas with the leave of the court, is not a withdrawal of prior pleas in the cause. *Gardner vs. Miles*, 94.
2. Where there are issues of fact, and several issues in law, and the county court renders a judgment generally upon the issues of law, it is to be presumed they acted upon all of them, and they will be so reviewed upon appeal. *Ib.*
3. Ambiguity in pleading is the subject of special demurrer. *Ib.*
4. Where an action is brought by *A.* and the defendant's plea in bar averred that a person of the same name was a party to proceedings in equity, described in the plea; this is inferentially stating in the plea that it is the same person. *Ib.*
5. In an action upon an injunction bond, the recitals and condition of which mentioned a judgment, the defendant pleaded general performance. The plaintiff assigned a breach, to which the defendant rejoined no such record of judgment as the plaintiff in his assignment hath alleged. This rejoinder is bad on demurrer. *Hardey et al. vs. Coe*, 189.
6. When the fact of a judgment obtained is admitted in the recital and condition of a bond, the obligors are estopped from denying it in their pleadings. *Ib.*
7. But where in such a case a demurrer was not resorted to, and the plaintiff surrejoined there was such a record, and prayed that it might be enquired of by the court, and the defendant doth the like; this makes an issue of no such record, which is a matter of law to be tried by the court. *Ib.*
8. Where a partial payment, as a compromise, is of such a character as to bar the plaintiff's right to recover, it ought to be pleaded by way of accord and satisfaction, and not as a payment. *Ib.*
9. Where a single bill is made payable to *F.*, agent, and the declaration describes it as made to *F.*, this is not a variance. *Graham vs. Fahnestock*, 215.
10. The addition of the word agent in such case is a mere description, and is like the case of a note payable to an executor. The promise is to the agent personally. *Ib.*
11. Whether the obligee of a bill is empowered to assign it, is a question of law. A plea which puts that question to the jury is bad on demurrer. *Ib.*
12. Where the subject of a plea is in abatement, and it is not verified by affidavit, the court will reject it upon motion. *Ib.*
13. A plea that the plaintiff is an infant, is in abatement. *Ib.*

PLEAS AND PLEADINGS—*Continued.*

14. Upon a single bill payable to *W.*, administrator of *R.*, the administrator of *W.* may declare and recover against the obligor. *West vs. Chapel*, 228.
15. The administrator *de bonis non* of *R.* would have no right to such a single bill, until the Orphans court, under the act of 1820, ch. 74, sec. 3, upon application, had directed the administrator of *W.* to deliver such bill to him. *Ib.*
16. That act impliedly clothed the Orphans court with authority to enquire, as preliminary to such an order, into the fact, whether the property claimed was or not administered. Until the order was passed, the title to the bill remained in the executor or administrator of the deceased administrator, the obligee. *Ib.*
17. But even after an order for the delivery of such a single bill, a suit upon it must be brought in the name of the legal representative of the obligee, for in him the legal title would remain; no authority being given by the act to sue in any other name. *Ib.*

## PLEAS AND PLEADINGS IN EQUITY.

1. A court of law will not decide, collaterally, whether the decree of a court of equity is correct. If a case is stated in the pleadings, which gives the court of equity jurisdiction, it is all that need be ascertained. *Gardner vs. Miles*, 94.
2. The jurisdiction of the court under the act of 1820, ch. 191, depends upon the allegations that the party died intestate of such an estate as is described in the act; that the parties entitled to such intestate's estate cannot agree upon a division; or that some of the parties are minors. *Tomlinson et al. vs. McKaig et al.* 256.
3. Under the prayer for general relief, the complainants are entitled to such action of the court, and decree, as the case made in the bill would by law entitle them to. *Ib.*
4. As relates to the question of jurisdiction, no prayer for a partition or appointment of commissioners to divide and value was necessary. *Ib.*
5. Where the case made by the bill is within the jurisdiction of the court, neither the inappropriate averment that the land was incapable of division, nor a prayer for the appointment of a trustee to sell, would affect that question. *Ib.*
6. It is the allegations in a bill which confer jurisdiction, and determine the power of the court. *Ib.*
7. A course of procedure adopted by a court subsequent to the filing of a bill, decree without or upon insufficient proof, is error in the exercise of jurisdiction, but do not indicate a want of it. *Ib.*
8. The true test of jurisdiction will in all cases be found in the determination of the question, whether a demurrer will not lie to a bill. *Ib.*
9. Where the courts are authorized to sell real estate upon the application of parties under certain circumstances, by act of Assembly, and the act points out the various steps to be taken after filing the bill, as the appointment of commissioners, the procurement of their judgment upon the practicability of dividing the land, their valuation of



PLEAS AND PLEADING IN EQUITY—*Continued.*

it, and securing to the heirs-at-law in succession, the right of electing to take the estate at the valuation, the absence of such steps in the cause would, in *England*, be the subject matter of a bill of review where the decree recites the proceedings in the cause. *Ib.*

10. But here where the English practice of reciting the proceedings in the decree does not prevail, the proceedings themselves are the subject matter of revision in a bill of review, to the same extent, and in the same manner, as if they were stated on the face of the decree, in conformity to the *English* practice. *Ib.*
11. In the year 1814, a partnership consisting of *four* persons, existed. In that year a *fifth* partner was added. In 1825, *one* of the original partners withdrew from the firm. In 1835, *another* of the original partners withdrew. In 1843, the *fifth* partner withdrew, and filed a bill requiring a settlement and account of the partnership concerns from 1814 to 1843, against all the four original partners. To this bill all the original parties demurred, upon the ground of multifariousness. *Held*, that in deciding this question, the attention of the court is confined to the bill itself. It arises upon demurrer, which admits every thing in the bill, properly introduced into it, to be true. *White et al. vs. White*, 359.
12. Where an agent of a firm, against whom no decree can be obtained upon the allegations of the bill, is made a defendant with the members of the same, he may demur to the bill as multifarious. *Ib.*
13. A bill should not confound distinct matters, or blend several matters distinct and unconnected, nor demand several matters, of distinct natures, against several defendants. *Ib.*
14. So upon a bill against co-partners for a settlement and account of partnership concerns, a claim to impeach a judgment, and mortgage given by the firm to one of its agents, ought not be included, nor such agent made a party defendant. The agent has a right to have such claim decided alone. *Ib.*
15. When a bill is liable to be dismissed for multifariousness, it ought to be dismissed *in toto*.

See MORTGAGE, 4, 5, as to plea of a *bona fide* purchaser.

## POSSESSION OF REAL PROPERTY.

See MORTGAGE, 4, 5.

PURCHASER, 1.

## PRACTICE.

1. The defendant pleaded in bar to the plaintiff's declaration, and tendered an issue to the country. Several terms after, before the issue was made up, the defendant prayed leave to amend his plea, and plead anew, which was granted. *Gardner vs. Miles*, 94.
2. The defendant then pleaded three new pleas, viz: Nos. 2, 3 and 4. To the 1st and 3d pleas, the plaintiffs then joined issue, and demurred generally to the 2d and 4th pleas. The county court sustained the demurrers, and overruled the 2d and 4th pleas. This defendant again obtained leave to plead anew, and then pleaded two pleas; upon the

## PRACTICE—Continued.

- first of which, the plaintiff joined issue, and demurred to the second. He again obtained leave, and pleaded his 3d, 4th and 5th pleas. The plaintiff demurred to the 3d and 4th of the last amended pleas, and joined issue upon the 5th. The county court rendered judgment upon the demurrers to the 2nd and 3d, and the 4th amended pleas for the defendant. Held, that the 2nd amended plea, which was demurred to, was not withdrawn or waived by the leave to amend, and filing the 3d and 4th amended pleas. *Ib.*
3. Filing additional pleas with the leave of the court, is not a withdrawal of prior pleas in the cause. *Ib.*
  4. Where there are issues of fact, and several issues in law, and the county court renders a judgment generally upon the issues of law, it is to be presumed they acted upon all of them, and they will be so reviewed upon appeal. *Ib.*
  5. The defendant, in a *scire facias*, by the plea of *nul tiel record*, may avail himself of the fact, that the judgment on which the *sci. fa.* is founded, was interlocutory. *Clark vs. Digges*, 109.
  6. Where a *scire facias* is not defective on its face, but states a good judgment, the motion to quash will not avail a party who desires to show, that by the error of the clerk, an interlocutory had been treated as a final judgment. *Ib.*
  7. A "judgment" entered on the docket, "for \$12,000, penalty and costs; to be released on the payment of—" is not interlocutory. It indicates a judgment, by confession, for the penalty; to be released upon the payment of such sum as might thereafter be agreed upon; and that it is not a binding judgment, until the sum shall be ascertained, as originally contemplated. *Ib.*
  8. In determining the character of a judgment, this court can only look to it as extended by the clerk of the county court; whether it has been properly extended by the clerk, cannot be enquired into by this court collaterally. *Ib.*
  9. Motions for the amendment of an original judgment, made upon the return of *scire facias* to revive it, are necessarily to be made in the original cause; and can only be acted upon, on appeal taken in that cause. If made in the *scire facias* cause, they will be overruled. *Ib.*
  10. Under the act of 1830, ch. 165, the person for whose use a judgment has been entered, may prosecute a writ of *scire facias* to revive it in his own name. *Ib.*
  11. The term "equitable assignee," in that act, is sufficiently comprehensive to include the *cestui que use*. *Ib.*
  12. It is the duty of counsel, if aware of objection to the admissibility of evidence, to object to it at the time it is offered to be given—or if unapprised of such objection at the time of its offer, he must raise his objections in a reasonable time thereafter. *Dent vs. Hancock*, 120.
  13. If he cross-examine the witness in regard to the inadmissible evidence, or offer testimony to contradict or explain it, a purely legal objection,

PRACTICE—*Continued.*

- which is disclosed on the face of the proof itself, the objection afterward comes too late. *Ib.*
14. The objection is equally too late when a prayer has been first made upon the evidence, or when the argument of the cause before the jury has commenced. *Ib.*
  15. The rules above stated are not applicable to a case where the cause of objection depends on matters of fact, of which the party objecting has then, for the first time, acquired a knowledge. *Ib.*
  16. Where an action is brought by one of several, with whom a contract had been made, the defendant may take advantage of it upon evidence at the trial, upon the plea of *non assumpsit*. *Hoffar & wife vs. De-ment*, 132.
  17. Where there are both issues of law and fact, it is the duty of the court to dispose first of the issue of law. *Hardey et al. vs. Coe*, 189.
  18. Under the act of 1798, ch. 101, sub ch. 15, sec. 17, either party may apply to the Orphan's court for issues to be sent to the county court, if there be any matters properly in issue between the parties to a contest upon plenary proceedings. *Smith et ux. vs. Young*, 197.
  19. Whether there are any such matters in issue, the court will determine as a question of law. *Ib.*
  20. After a sale of land made by a sheriff, certified in his return to a writ of *rendi.*, objected to in the county court, upon a motion for a writ of *hab. fac. pos.* to put the purchaser into possession the writ was granted, and affirmed upon appeal, the legality of the sale in that cause is no longer an open question. *Penn et al. vs. Isherwood*, 206.
  21. A judge of this court, satisfied by the oath of a party entitled to a writ of possession, that the sheriff of the county could not with safety be trusted to execute such writ, may order the clerk to issue the writ to an elisor named and appointed by such judge. *Ib.*
  22. The acts of 1794, ch. 54, sec. 5, and 1843, ch. 270, require applications for the appointment of elisors to be supported by proof which will satisfy the judge to whom application may be made, that the sheriff cannot be safely trusted with the execution of the writ; those acts did not design that any matter of right should be decided upon such application. *Ib.*
  23. Language of a character similar to that in the acts of 1794, ch. 54, sec. 5, and 1843, ch. 271, sec. 1, is used in the act of 1773, ch. 7, sec. 7, in relation to the obtention of commissions to take proof, and from that period the construction of such words has been settled. *Ib.*
  24. It is the practice in all the county courts of the State to order commissions to take proof to issue upon the affidavit of parties, where no other objection is made than the insufficiency of the affidavit of the party himself for such a purpose. *Ib.*
  25. In support of motions to quash returns to writs of possession, and show that more land was delivered than authorized by the writ, the court will grant leave to take proof by affidavit on notice, and make surveys. *Ib.*

PRACTICE—*Continued.*

26. Where the subject of a plea is in abatement, and it is not verified by affidavit, the court will reject it upon motion. *Graham vs. Fahnestock*, 215.
27. Where a creditor after an execution levied, gives a release or receives payment of his judgment, that defence would be properly made in the court of law, at the return of the execution, and no where else. *Gurley vs. Hileshue*, 217.
28. After an execution levied, the debtor paid off part of the judgment, and entered into an agreement with the plaintiff, that for the balance he would convey his interest in a lot, upon which the plaintiff agreed to discharge him. This agreement is not sufficient to arrest proceedings on the judgment. *Ib.*
29. Where the defendant prays the court to instruct the jury that the plaintiff is not entitled to recover, the grounds assigned for that instruction must be co-extensive with the plaintiff's right, as established by the proof, or it is not error to refuse it. *Hall vs. U. S. Insurance Co.* 484.

See CORPORATIONS, 1.

EJECTMENT—for practice in this action.

## PRACTICE IN CHANCERY.

1. When a party applying for an injunction admits that he owes a balance to the person to be enjoined, the court may require such balance to be brought into court to be paid accordingly. *Flickinger vs. Hull*, 60.
2. When a case is before the court on the motion to dissolve an injunction, and on bill and answer, the answers are to be taken as true, so far as they affect the interests of the defendants respectively making them, and so far as they are responsive to the bill; and the statements of the bill are to be received as true, so far as they are not denied. *Alexander et al. vs. Ghiselin et al.* 138.
3. It is proper as a general rule, very rarely, if ever, to be departed from, that an injunction bond should be required, when an application is allowed that delays the recovery or receipt of money, or which lessens, or in any respect endangers, any existing securities, or renders liable to loss thereby, any money, profits, or property, which the adverse party is by injunction prevented from receiving or enjoying. *Ib.*
4. Where a judgment creditor had sued out execution, and levied it upon the personal property of the defendant, who afterwards applied for relief under the insolvent laws, and a trustee was duly appointed, upon a bill filed by other creditors of the insolvent claiming a specific lien by way of mortgage on such property, and the insolvent's trustee, for an injunction to arrest the sale of the property by the sheriff. *Held*, that the complainants were entitled to such injunction, but that a bond should have been filed and approved before it issued. *Ib.*
5. In general, where an injunction issues without bond, the defendants may petition for an order of court, requiring bond to be given by a reasonable period, or on default, to have the injunction dissolved. *Ib.*
6. But when the answers have come in, and they show on their face a case for a perpetual injunction, and the continuance of the writ was not



PRACTICE IN CHANCERY—*Continued.*

- dependent upon a question of law or fact to be established, it would be wholly unnecessary to require a bond. *Alexander et al. vs. Ghiselin et al.* 138.
7. Before the ratification of a sale in equity, all objections to it are open for consideration, and the sale will be set aside upon proof of error, mistake, misunderstanding, or misrepresentation as to the terms or manner of the sale. It must appear to be in all respects fair and proper, or it cannot receive the sanction of the court. *Tomlinson et al. vs. McKaig et al.* 256.
  8. After the sale has been confirmed, and after the term has passed, and the proceedings are considered as enrolled, the court possesses no power to annul the same, except by bill of review for error apparent on the face of the decree, or by an original bill to annul the same for fraud. *Ib.*
  9. Where bills are necessary to be filed to carry decrees into execution, the law of the decree is not examinable, and will be enforced, unless delayed or stayed for re-hearing of the former case, if not enrolled; or if enrolled, for a bill of review. *Ib.*
  10. Upon a bill filed by the devisees of a purchaser, under a decree to sell real estate, to compel the trustee to make a conveyance, who refused to convey after ratification of sale and enrolment of the decree, it is error in the court to adjudge the decree erroneous and invalid, when it was within the jurisdiction of the court. *Ib.*
  11. Where a bill was filed against infant defendants and others, under the act of 1820, ch. 191, to sell an intestate's real estate, upon the ground that the parties entitled could not agree upon a division thereof, and the land was ordered to be sold *irrespective of the directions of that act*, it is competent for the defendants to question the regularity or validity of the decree, either by a bill of review, or by an original bill for fraud. *Ib.*
  12. So where a bill was filed to enforce a purchase under *such a decree*, and the defendants in the first proceeding contested the right of the complainants in the second to the purchase made by them, it is the duty of a court of equity to stay the execution of the first decree, until an opportunity might be afforded the defendants, within which they should be at liberty to file an original bill to set aside the decree for fraud, and to the infants, within which they might file a bill of review, to vacate the decree for errors apparent on its face, to effect which objects the cause was remanded after a reversal of a decree dismissing the bill in this cause. *Ib.*
  13. Where the bill made a case under the act of 1820, ch. 191, sec. 8, the court should pursue the provisions pointed out by that act, or it is error of procedure, but does not affect the jurisdiction of the court. *Ib.*
  14. Equity may oblige a complainant to assume the position of a defendant, that justice between the parties may be effectuated; and where the case justifies it, will decree at once without waiting for such change of position. *Farmers and Mechanics Bank et al. vs. Wayman and Stockett*, 336.

PRACTICE IN CHANCERY—*Continued.*

15. Where trustees were properly proceeding against parties, who by negligence had permitted the trust funds to be converted, and alienated to innocent and irresponsible parties, the costs incurred by them ought to be allowed out of the trust fund, though the decree was reversed for error in the extent and primary liability of some of the defendants, still it was without costs to them. *Ib.*
16. This court by the act of 1841, ch. 163, is prohibited from allowing any objection to be urged to the jurisdiction of the court of Chancery, when no such objection was there taken. *Ib.*
17. In the year 1814, a partnership consisting of *four* persons, existed. In that year a *fifth* partner was added. In 1825, *one* of the original partners withdrew from the firm. In 1835, *another* of the original partners withdrew. In 1843, the *fifth* partner withdrew, and filed a bill requiring a settlement and account of the partnership concerns from 1814 to 1843, against all the four original partners. To this bill all the original parties demurred, upon the ground of multifariousness. *Held*, that in deciding this question, the attention of the court is confined to the bill itself. It arises upon demurrer, which admits every thing in the bill, properly introduced into it, to be true. *White et al vs. White*, 359.
18. When a bill is liable to be dismissed for multifariousness, it ought to be dismissed *in toto*. *Ib.*
19. Where a bill is demurred to, the demurrer overruled, the defendants ordered to answer over or plead by a given day, and failing to answer, a final decree was passed against them, which, among other things, decreed a sale. Under the act of 1841, ch. 11, sec. 1, they may prosecute an appeal. *Ib.*
20. Proceedings to divide the real estate of an intestate, situated in two counties, are properly had under the descent act in the Court of Chancery. They should, however, in all respects, be in conformity to the provisions of the act of 1820, ch. 191. *Bennett et al. vs. Bennett et al.* 463.
21. The application may be made to the Court of Chancery either by bill or petition. *Ib.*
22. When the commissioners, in such a case, did not conform to the act of 1820—nor the commission require them to pursue the provisions of that act, it is ground of error. *Ib.*
23. Before a decree, *pro confesso*, is obtained upon an order of publication, citing a non-resident defendant, there should be proof of the fact of such non-residence. (*Rep'r.*) *Ib.* 467.

See COURT OF CHANCERY, 37, 38.

PLEAS AND PLEADING, 9, 10.

## PRACTICE IN THE COURT OF APPEALS.

1. Upon an appeal from an order of the Court of Chancery determining a question of right between the parties, and directing an account to be stated on the principle of such determination, in pursuance of the act of 1845, ch. 367—this court can only inquire into the correctness of

PRACTICE IN THE COURT OF APPEALS—*Continued.*

- the principles announced by the Chancellor as the basis of the auditor's report. *Goodburn and wife vs. Stevens et al.* 1.
2. This court cannot consider any other questions than those determined by the court below for the government of the auditor, without exercising original jurisdiction. *Ib.*
  3. An appeal will not lie from an order of the county court, made in proceedings under the act relating to insolvent debtors, refusing to associate another trustee with the permanent trustee of the insolvent, nor ordering a sale made by such trustee to be ratified and confirmed. *Williams vs. Williams*, 84.
  4. The trustee of an insolvent debtor cannot appeal from an order of the county court, before which the application of the insolvent is depending, directing him to sell the right and title of the insolvent to certain stock mentioned in his schedule of effects. *Williams vs. Williams*, 88.
  5. Such an appeal is not authorized by any act of assembly; and it is not a case either at law, or in equity. *Ib.*
  6. Where the recognizance to indemnify the county for the support of an illegitimate child becomes insufficient by reason of the insolvency of the security, the county court may order the father to enter into a new recognizance, and no appeal lies from such an order. *Oldham vs. State*, 90.
  7. Upon the judgment of the county court, rendered upon the issue joined of *nul tiel record*, that there is such a record, this court is bound to believe that the county court made its decision by an inspection of the record. *Hardey et al. vs. Coe, use, &c.* 189.
  8. At the trial before the jury, the plaintiff took a bill of exceptions, in which it was stated that he, to support the issue joined on the plea of *nul tiel record*, offered a record in evidence to the jury. This was objected to, but the court permitted it to be read. By the decision the defendant sustained no injury, and had no right to complain; as he by his pleading, had admitted every fact which the record could establish. *Ib.*
  9. Where it does not appear from the record, that any question was raised in the county court as to the form, or sufficiency of the pleadings, this court is not at liberty to act upon such questions. *Ib.*
  10. A judge of this court, satisfied by the oath of a party entitled to a writ of possession, that the sheriff of the county could not with safety be trusted to execute such writ, may order the clerk to issue the writ to an elisor named and appointed by such judge. *Penn et al. vs. Isherwood*, 206.
  11. The acts of 1794, ch. 54, sec. 5, and 1843, ch. 270, require applications for the appointment of elisors to be supported by proof which will satisfy the judge to whom application may be made, that the sheriff cannot be safely trusted with the execution of the writ; those acts did not design that any matter of right should be decided upon such application. *Ib.*
  12. This court by the act of 1841, ch. 163, is prohibited from allowing any objection to be urged to the jurisdiction of the Court of Chancery,

PRACTICE IN THE COURT OF APPEALS—*Continued.*

- when no such objection was there taken. *Farmers and Mechanics Bank et al. vs. Wayman and Stockett*, 336.
13. Where a bill is demurred to, the demurrer overruled, the defendants ordered to answer over or plead by a given day, and failing to answer, a final decree was passed against them, which, among other things, decreed a sale. Under the act of 1841, ch. 11, sec. 1, they may prosecute an appeal. *White et al. vs. White*, 359.
  14. On the 7th January, the Chancellor made a final decree, which, at the same term, upon petition filed in February, he annulled, unless good cause be shown to the contrary, during the four first days of the next term. The parties who obtained the decree filed their answers showing cause, upon which, on the 8th November, 1845, the Chancellor dismissed the petition of February. The petitioners, on the 15th December, 1845, appealed both from the January and November decrees. *Held*,
  15. That although the January decree bore date more than nine months before the appeal prayed, yet as while the decree was suspended, no right of appeal existed—the appeal in this case was in due time. *Bennett et al. vs. Bennett et al.* 463.
  16. When a decree is suspended, by order of court, at the same term at which it was passed, the right to appeal commences after the suspending order is disposed of. *Ib.*
  17. An appeal will not lie from an order of the Orphans court, refusing to revoke letters testamentary. *Hebb et al. vs. Hebb*, 510.
- See PLEAS AND PLEADING, 2.  
PRACTICE, 4.

## PRESUMPTION OF LAW AND FACT.

1. Where a person in one character is debtor, and the same person in another character is creditor, the law regards the debt as paid by the debtor capacity to the creditor. *Flickinger vs. Hull*, 60.
  2. Where a man has several capacities, and is found in possession of property, the law will attach the possession to the capacity in which of right it ought to be held. *Ib.*
  3. So also, where having different capacities, he executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the person does not profess to exercise it in virtue of that particular power. *Ib.*
  4. Upon the judgment of the county court, rendered upon the issue joined of *nul tiel record*, that there is such a record, this court is bound to believe that the county court made its decision by an inspection of the record. *Hardey et al. vs. Coe, use, &c.* 189.
- See CORPORATIONS, 9,  
COURT OF CHANCERY, 8, 9.  
EVIDENCE, 30.

## PRINCIPAL AND AGENT.

- See PLEAS AND PLEADING, 9, 10.  
PRESUMPTION OF LAW AND FACT, 1 to 3.



## PRIORITY OF PAYMENT.

See THE STATE OF MARYLAND, 1.

## PURCHASER.

1. The fact of the possession of a party, whose rights are involved in a purchase, is a sufficient intimation of those rights, to put the purchaser upon an inquiry into their nature, and failing to make it, he is in equity visited with all the consequences of the knowledge of the title. *Baynard vs. Norris et al.* 468.

See MORTGAGE, 4, 5.

VENDOR AND VENDEE, 1.

## RELEASE.

See EVIDENCE, 1 to 4.

GUARDIAN AND WARD, 1.

## RENTS AND PROFITS.

See WILL AND TESTAMENT, 1.

## SALES OF PERSONAL PROPERTY.

1. The act of 1729, ch. 8, was intended for the protection of creditors, and has no application to a sale of personal property *inter partes*. *Gough vs. Edelen*, 101.
2. Although a sale of personal property, of which the vendor retains possession, is void as far as the rights of creditors are concerned, unless there is a bill of sale acknowledged and recorded in the mode prescribed by that act—still it is effectual against the vendor, and all claiming under him. *Ib.*
3. There may be a perfectly valid transfer of personal property, both at common law, and under the 17th sec. of the statute of frauds, without either an actual delivery of possession, or a bill of sale. *Ib.*

## SCIRE FACIAS.

See JUDGMENT, 1 to 4.

PRACTICE, 5 to 11.

## SET-OFF.

1. To claim a right of discount or set-off, is not an obligation or duty on the part of him who is entitled to it. He may waive or assert it at his election. Having once waived it, and thereby obtained a dividend out of the effects of his debtor, to which, neither at law nor in equity, would he otherwise have been entitled, he will not afterwards be permitted to assert his claim by way of discount or set-off. To suffer him to do so, would, in contemplation of law, if not in fact, be practising a fraud upon the other creditors of his debtor. *Hall vs. U. S. Insurance Company*, 484.

## SHERIFF.

See EXECUTION.

PRACTICE, 20, 21, 22.

## SINGLE BILL.

See PLEAS AND PLEADING, 9, 14, 17

## SPECIFIC EXECUTION OF CONTRACTS.

1. Under the agreement, in this case, if the debtor seeks a perpetual injunction against his creditor, his bill must be considered as one to enforce specific execution of his contract. The injunction in such case maintained, would accomplish all the purposes of specific execution. *Gurley vs. Hiteshue*, 217.
2. A decree of specific execution here, would require the creditor to receive a conveyance and execute a release, and that release presented to a court of law, would prevent further proceedings on the judgment. *Ib.*
3. The leading object in every case of specific performance, is to carry into full effect, the exact object and intentions of the parties to the agreement on which its demand depends. *Ib.*
4. This is done on the ground, that where an honest and fair contract has been entered into by parties competent to engage without imposition or mal-practice on either side, no advantage should be taken by either of any subsequent change of circumstances, or of opinion which might alter, or be supposed to alter, the benefits resulting to the parties respectively. *Ib.*
5. Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made the basis of a contract, the extraordinary jurisdiction of the court will not be exercised by coercing a specific performance. *Ib.*
6. Where a defendant, debtor by judgment, paid the plaintiff a part of his debt and proposed to pay the balance by the conveyance of a lot in which he had no interest, in consideration of a release to be granted him, and then seeks to procure a specific execution of the contract, it is asking the court to compel the creditor to exonerate him without consideration. If he intended to obtain a release, by nominally giving an equivalent, knowing it to be so, it would be a fraud. *Ib.*
7. A decree founded upon agreement to convey land in consideration of a release of a debt should provide as well for the transfer of the property as the execution of the release. *Ib.*
8. Upon a bill filed by the devisees of a purchaser, under a decree to sell real estate, to compel the trustee to make a conveyance, who refused to convey after ratification of sale and enrolment of the decree, it is error in the court to adjudge the decree erroneous and invalid, when it was within the jurisdiction of the court. *Tomlinson et al. vs. McKaig et al.* 256.
9. *F., Senior*, devised separate and distinct portions of his land to each of his three sons, *J., M. and F., Junior*; and to his two sons, *J. and M.*, an equal interest in the coal mine and saw mill on the part devised to *F., Junior*, as he took under his father's will. That estate he orally contracted to sell to *N.* In this state of things, *J., M. and N.* agreed with each other, that they and their heirs and assigns should thereafter have and enjoy free and equal intercourse to each one undivided third part of all the coal in and on all our land; that is to say, *F.'s, Junior*, part now sold to *N.* *J.* agreed to let *M. and N.* have free intercourse to the coal mines on his property left him by his father, and to let *M. and N.*

SPECIFIC EXECUTION OF CONTRACTS—*Continued.*

have the privileges of coal on his land, building a house at the mouth of the pit for the convenience of coal diggers. *M.* gave to *J.* and *N.* the same privileges; and *N.* gave to *J.* and *M.* the same privileges, and "to share alike and alike." This agreement, which was under seal, further declared, that *J.* and *M.* doth agree to give to *F., Junior*, and his heirs, the privilege of the interest of their two shares of coal, all that he will haul with his own teams, or his heirs, by digging coals for himself, or themselves, for which the said *F., Junior*, doth agree to keep the banks in complete order, so as not to injure them by digging, to destroy the banks. Shortly after this, *F., Junior*, conveyed his interest by deed to *N.* Held, that this agreement so far contains the essentials of a contract, and the intention of the parties is so manifest on its face, that a court of equity may decree its specific execution. *Young vs. Frost et al.* 287.

10. Improvidence or inadequacy of consideration, do not determine a court of equity against decreeing specific performance. When undue advantage is taken, it will not enforce that. *Ib.*

See COURT OF CHANCERY, 13, 14, 18, 21, 22.

## STATUTE 13 ELIZ. CH. 5.

1. Under the statute of 13 *Eliz.*, ch. 5, an indebtment by a grantor at the time of the voluntary conveyance made, is *prima facie* only, and not conclusive evidence of a fraudulent purpose, with respect to a prior creditor. *Worthington & Anderson vs. Shipley*, 449.
2. This presumption may be repelled by showing that the grantor or donor, at the time of the gift, was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations; and that the settlement impeached was a reasonable provision for his child, according to his or her station and condition in life. *Ib.*
3. A voluntary conveyance, made by a donor loaded with debt, involved with embarrassments, approximating to insolvency, or of the owner of an estate not adequate to the payment of the claims against him, is fraudulent and void, against a prior creditor seeking to impeach it. *Ib.*
4. The word "*voluntary*" is not to be found in the statute of 13 *Eliz.*, ch. 5. Deeds founded upon a good consideration, if made *bona fide*, are expressly excepted from its operation. Its provisions are directed against transfers concocted in fraud, and fabricated and devised by the debtor, for the purpose of delaying and defrauding his creditor. *Ib.*

## STATUTE OF FRAUDS.

1. There may be a perfectly valid transfer of personal property, both at common law, and under the 17th sec. of the statute of frauds, without either an actual delivery of possession, or a bill of sale. *Gough vs. Edelen*, 101.
2. The statute of frauds on the subject of consideration, in agreements to pay the debts of third parties, has no application to instruments under seal. *Edelen vs. Gough*, 103.

### STATUTE OF FRAUDS—*Continued.*

3. The terms, for value received, in a written instrument, are a sufficient expression of a consideration required by the statute of frauds. *Ib.*
4. A note given to secure the anterior indebtedness of the defendant to the plaintiff, does not require words of consideration to support it. *Ib.*
5. An agreement to mortgage personal property alone, to secure a debt due from one contracting party to the other, to be performed forthwith, is not affected by the statute of frauds; but if it had also related to land, it would have been within its operation. *Alexander et al. vs. Ghiselin et al.* 138.

See STATUTE, 13 Eliz. ch. 5.

### STATE OF MARYLAND.

1. As between the State and the other general creditors of a deceased debtor, whose lands were sold for the payment of the debts, in consequence of the insufficiency of his personal property, neither having a lien, the State is entitled to a priority of payment out of the proceeds thereof over such other creditors. *Smith et al. vs. The State*, 45.

### STOCKHOLDERS IN CHARTERED COMPANIES.

See CORPORATIONS.

### STREETS IN CITIES.

See M. AND C. C. OF BALTIMORE.

### SUPREME COURT OF THE UNITED STATES.

See CONSTITUTIONAL LAW.

### TAXES.

1. The stock of a bank is the representative of its whole property; and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the company becomes exempt from taxation. To tax both its real and personal property and its stock, would be a double tax, and therefore illegal and unjust. *Gordon, Ex. of Gordon, vs. M. & C. C. of Baltimore*, 231.
2. The ordinance of the city of *Baltimore*, of the 9th March, 1841, passed to carry into effect the powers granted by the act of 1838, ch. 226, directed the commissioners, after ascertaining the amount of damages and expenses to be incurred in any case, to assess the same on all the ground and improvements within the city, the owners of which, as such, the said commissioners should decide to be benefited by accomplishing the object authorized in the said ordinance—apportioning them in just proportion, according to the value of the benefit, which, in the estimation of the said commissioners, will accrue to each owner of any right or interest claimed in any such ground or improvements—does not subject the individuals embraced by it to an unequal and partial tax, for the prosecution of an improvement in which the whole community is interested. *Alexander & Wilson vs. M. and C. C. of Balt.* 383.
3. No burden is imposed by such an ordinance on the person on whom it operates. It is a mere requisition that the owners of property, the



TAXES—*Continued.*

value of which is enhanced by the opening of the street, shall pay for the improvement in a ratio to the benefit derived from it. *Ib.*

See MAYOR AND C. C. OF BALTIMORE.

VOLUNTARY PAYMENT.

## TRESPASS, Q. C. F.

See EJECTMENT.

## TROVER.

See BILLS OF EXCHANGE, &c. 8.

## TRUSTEE'S SALES UNDER ORDER OF COURT.

1. Before the ratification of a sale in equity, all objections to it are open for consideration, and the sale will be set aside upon proof of error, mistake, misunderstanding, or misrepresentation as to the terms or manner of the sale. It must appear to be in all respects fair and proper, or it cannot receive the sanction of the court. *Tomlinson et al. vs. McKaig et al.* 256.
2. After a sale has been confirmed, and after the term has passed, and the proceedings are considered as enrolled, the court possesses no power to annul the same, except by bill of review for error apparent on the face of the decree, or by an original bill to annul the same for fraud. *Ib.*

See PRACTICE IN CHANCERY, 7, 8.

## TRUSTS—TRUSTEE.

1. A trustee filed a bill against all his *c. q. t.* for a settlement of the trust estate. Whilst pending, propositions of compromise were made; and that the parties might be fully informed of their rights, the books of the trust were subjected to examination; accounts were examined by the *c. q. t.*'s solicitors and some of the *c. q. t.* and a skilful accountant, at the request of the trustee's solicitor; upon that examination, the solicitor of the *c. q. t.* advised a compromise, which was effected, and carried into execution. Every facility was furnished for the examination of the accounts. No evidence of books or accounts kept back. The solicitors of the parties were fully competent to determine what was due. This led to the execution of a release, by the complainant to the trustee, while under age. Twelve days after he came of age, and about fourteen months after the execution of the *first* he executed a *second* release. *Held*, that the *second* release was based on the *first*; was not subject to the imputation of undue influence, and was made with knowledge of his rights by the complainant, and therefore valid. *Forbes vs. Forbes*, 29.
2. In April, 1826, *I.* transferred to *R.* and *H.*, trustees under the will of *L.*, for the benefit of *A.* wife of *S.*, during her natural life, and after her death in trust for the infant devisees in said will, and pursuant to an order of the Chancellor of 20th January, 1826, certain shares of the capital stock of the *Bank of W.* The books of the bank showed the transfer as above. The bank was incorporated at *W.* in 1815, and in 1821 was authorized to establish an office at *F.* In 1826, the prin-

TRUSTS—TRUSTEE—*Continued.*

- cial bank was transferred by law to *F.*, with a branch at *W.*; the officers at *W.* furnished a list of stockholders to those at *F.*, by which it appeared that the stock stood in the name of *A.* wife of *S.* In 1829, these institutions were declared separate and independent corporations, and in 1830, the stock standing at *F.* in the name of *A.* wife of *S.*, was by them sold and transferred to an innocent third party, without the knowledge of *R.* and *H.* the trustees. After this *S.* died; *A.* administered upon his estate; and it coming to the knowledge of *H.*, one of the trustees, that the bank stock at *W.* had been transferred and sold by *S.* and wife, he applied to her, and she paid him in 1833, through the surviving partner of her husband, \$1000, and in 1842 delivered him certain stocks, then of value as a payment or security for the trust funds disposed of as aforesaid. Some of the stocks turned out of no value. Upon a bill filed against the banks at *W.* and *F.*, the widow and administratrix of *S.* and the purchasers of the stock by *R.* and *H.*, &c. to repair the injury done the trust,—*Held*: That *H.*, one of the trustees, having received money and stocks on account of the trust, and being thus liable to account with the trust estate, could not as complainant be entitled to a decree without such accounting. *Farmers & Mech. Bank et al. vs. Wayman & Stockett*, 336.
- 3 As it did not clearly appear whether the stocks transferred by *A.* to *H.* were in payment, or by way of security, this court considered it premature to decree upon those subjects, but left them for further investigation in the Court of Chancery, as well in relation to the principal fund as the interest. *Ib.*
  4. The co-complainant and trustee *R.* may recover from the administratrix of *S.* in due course of administration, to the extent of assets which have come to her hands, such sum as he may be unable to recover from *H.* *Ib.*
  5. The injury which the trust estate has sustained, will be repaired by the payment of a sum equivalent to the price at which the stock was sold, when the transfer was made by *S.* and wife. *Ib.*
  6. Such sum should be invested for the benefit of the *c. q. t.* under the will of *L.* *Ib.*
  7. For *A.*'s participation in the transfer of the stock, as she was a *feme covert*, under the dominion of her husband, she incurred no penalty or forfeiture of her right as *c. q. t.* for life. She claimed nothing on account of interest; and there is no reason why the estate, if repaired, may not be increased for the benefit of those in remainder. *Ib.*
  8. After the accounting by *H.* and by *A.* as administratrix of *S.* such a sum shall not be found due from both, as with the funds in court will be sufficient to reinstate the trust estate to the amount of the stock transferred by *S.* and *A.*, then the balance necessary to accomplish this object should be paid by the two banks; and if the decree against *H.* and *A.* should be unavailing to the *c. q. t.* the amount for which they shall be decreed to pay, then the said banks ought to be held responsible for any deficiency that may occur. *Ib.*

TRUSTS—TRUSTEE—*Continued.*

9. Where there is no knowledge in the trustees of the violation of an express trust, nor in the *cestui que trusts*, no acquiescence can be imputed to them, and hence, lapse of time is no bar in favor of those guilty of such violation. *Ib.*
10. Where trustees were properly proceeding against parties, who by negligence had permitted the trust funds to be converted, and alienated to innocent and irresponsible parties, the costs incurred by them ought to be allowed out of the trust fund, though the decree was reversed for error in the extent and primary liability of some of the defendants, still it was without costs to them. *Ib.*

## USE AND OCCUPATION.

See LANDLORD AND TENANT, 7, 8.

## VARIANCE.

See EVIDENCE, 27.

PLEAS AND PLEADING, 9, 10.

## VENDITIONI EXPONAS.

See EXECUTION.

## VENDOR AND VENDEE.

1. A vendor of land not being paid the price in full, made a conveyance to his vendee, who afterwards became a bankrupt under the laws of *The United States*. The vendor then filed his bill in equity to enforce his lien for the balance due him, against a purchaser with notice from the assignee of the bankrupt. *Held*, that the vendor would have had full remedy in the case in the District Court of the *United States*, as an incumbrancer on the premises sold, and that the title of the purchaser from the assignee could not be disturbed under this bill. *Wilson vs. Turpin*, 56.
2. The assignee has authority to administer the assets of a bankrupt, whether real or personal, and especially to sell mortgaged estates, and of course, to pass a title to the purchaser in every case where the jurisdiction of the State Court had not attached. *Ib.*

## VOLUNTARY PAYMENT.

1. The tax on bank stock under the act of 1841, not being paid to the city of *Baltimore* by a stockholder, a non-resident, the city proceeded by way of attachment against the stock. After judgment of condemnation and execution levied upon the stock, the executor of the shareholder paid the city under protest, and brought an action of assumpsit to recover back the money, on the ground that the tax was illegally exacted. *Held*:
  1. That money paid on an execution issued upon a judgment of a court of competent jurisdiction, as in this case, cannot be recovered back in assumpsit, although it was afterwards discovered that the money was not due, and the plaintiff is in a situation to prove the fact.
  2. Where money has been paid under the sentence or judgment of a court which has no jurisdiction whatever in respect of the subject

VOLUNTARY PAYMENT—*Continued.*

matter, an action to recover it back may be maintained. *Gordon, Ex. of Gordon, vs. M. & C. C. of Balt.*, 231.

2. *M.*, an inhabitant of the city of *Baltimore*, was a stockholder in several banks there, chartered prior to the year 1821. The Corporation of that city imposed taxes upon the stocks of said banks for the use of the city, and assessed a portion thereof to *M.*, who *voluntarily* paid such tax. Afterwards considering said taxes illegally levied, *M.* demanded the return of the money paid by him, which the city refused. In an action of assumpsit brought to recover back the taxes paid, *Held*, that whether the tax was legal or illegal, the payment being voluntarily made, could not be recovered back. *Morris vs. M. & C. C. of Balt.*, 244.

## WARRANT OF RESURVEY.

*See* EJECTMENT.

## WILL AND TESTAMENT.

1. The testator devised all the rest of his estate to be sold, and the money arising therefrom to be invested and held for the use of his child. The rest of his estate, of whatsoever kind, after deducting his wife's dower and thirds, he gave to his child. By a codicil he declared that with respect to the estate, which by his will is given to his child, it was his desire that in the event of his dying in infancy, that the estate provided for be given to *W.* and *H.* and in that event, to be equally divided among them. The child died several years after the father, in infancy. *Held*, that the property devised to the child was that which existed at the testator's death; the profits upon its investment constitute no part of that estate; these are the fruits of the devise, belong to the child, and do not pass under the codicil. *Worthington and Hicks vs. McPherson*, 51.
2. In arriving at a testator's intention, as expressed in any clause of his will, we are to give as far as is consistent with such intention, some meaning and operation to every expression contained in the clause. *Swope et al. vs. Swope*, 225.
3. A testator devised to his wife all his real and personal estate "as long as she continues my widow, but if she intermarries, she is to have no more than the law allows her, and the residue to be equally divided among my sons and daughters; but if she continues my widow, she is to hold, enjoy or dispose of it at her discretion, as I do at present." *Held*, that all that is or was intended to be given to the widow, was an estate during widowhood, on condition that if she married she was thereafter to have nothing more than what the law would have allowed her had no such devise been made; but if she continued his widow, then a fee simple was given her. *Ib.*
4. The testator devised to his son *J.* his home plantation in fee, and to his son *S.* another plantation, in fee. To his daughter he devised \$1,000, of which \$600 was to be paid by *J.* and \$400 by *S.* at the expiration of three years from the testator's death, on his attaining full possession, which ever may last happen; with two years interest



WILL AND TESTAMENT—*Continued.*

from J. and S. The rest and residue of his estate he devised absolutely to his two sons. *Held*, that the legacy to the daughter was a charge upon the land devised to the sons on the proportions of three-fifths and two-fifths. *Crawford vs. Severson*, 443.

5. Such a bequest is not payable as legacies ordinarily are out of the personal estate, but is to be paid by the two sons, and *quoad hoc* the lands were held by them in trust. *Ib.*
6. If a testator direct a particular person to pay a legacy, in the absence of all other circumstances, he is presumed to intend him to pay it out of the funds with which he is intrusted. *Ib.*
7. Where a testator devises a certain portion of his real estate to his daughters absolutely, with provision for the appointment of commissioners to divide the same among them by the allotment of such commissioners, the legatees take legal estates, under and by virtue of the testator's will, in the portions of the realty, severally, and to them respectively assigned; their title is not created by the allotment. *Baynard vs. Norris et al.* 468.













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